TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 286

THE UNITED STATES OF AMERICA, APPELLANT

vs.

MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED AUGUST 19, 1938

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A [Caption omitted.]

B In United States District Court for the Eastern District of Pennsylvania

No. 7380. December Term, 1936

UNITED STATES OF AMERICA

vs.

MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN

J. Cullen Ganey, Esq. S. L. Einhorn, Esq.

Docket entries

1937

Mar. 6—True Bill.
Mar. 17—Appearance of S. L. Einhorn, Esq., for defendants, filed.
Mar. 17—Order of Court fixing bail filed.
Mar. 30—Bond of Midstate Hort. Co., in $5,000, without surety filed.
Mar. 30—Bond of A. Setrakian in $5,000, with surety filed.
May 27—Motion for bill of particulars filed.
Nov. 10—Praecipe to place case on Argument List filed.
Dec. 7—Argued sur motion for bill of particulars.
Dec. 15—Order of Court granting motion for bill of particulars filed.

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Mar. 21—Bill of particulars filed.
Apr. 7—Demurrer filed.
May 19—Argued sur demurrer.
June 16—Opinion, Welsh, J., sustaining demurrer filed.
June 22—Order of Court sustaining demurrer and discharging defendants filed.
July 20—Petition for appeal to U. S. Supreme Court filed.
July 20—Order of Court allowing appeal filed.
July 20—Assignment of errors filed.
July 20—Citation allowed and issued.
July 20—Praecipe for transcript of records sur appeal filed.
July 20—Statement as to jurisdiction filed.

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July 26—Citation returned: "service accepted" and filed.
July 26—Notice to appellee and acknowledgment of service of copies filed.
Aug. 3—Statement of appellee against jurisdiction, Motion to dismiss appeal and Motion to affirm decision of this Court, filed.

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In United States District Court

No. 7380. December 1936 Sessions

UNITED STATES OF AMERICA

vs.

MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN

Soliciting, accepting, and receiving rebates and concessions in respect of the transportation of property in interstate commerce

Indictment

Filed March 6, 1937

The Grand Jurors of the United States of America, empaneled and sworn, in the District Court of the United States for the Eastern District of Pennsylvania, at the Term thereof, in the year one thousand nine hundred and thirty-six, and inquiring for that district, upon their oaths and affirmations present:

COUNT 1

1. That at all times mentioned in this indictment Midstate Horticultural Company, Inc., hereinafter referred to as Midstate and as defendant, was, and is, a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business at Fresno in said State, and was engaged in the shipping of grapes over the railway lines of common carriers by railroad in interstate commerce, including the railway lines and joint through routes of the common carriers hereinafter mentioned in this count of this indictment; that at all times mentioned in this indictment Arpaxat Setrakian, hereinafter also called defendant, was an officer and agent of said Midstate, to wit, Vice President, Secretary, and General Manager.

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2. That at all times mentioned in this indictment The Pennsylvania Railroad Company was a common carrier engaged in the transportation of property in interstate commerce by railroad for hire, and, in conjunction with various other common carriers by railroad for hire more particularly specified in this and in the several remaining counts of this indictment, operated joint through routes over and by means of their respective connecting railway lines, for the transportation of property from certain points in the State of California, to wit, Quality, Fresno, and Conejo in the County of Fresno, through the Eastern District of Pennsylvania, to a point on the railway line of said The Pennsylvania Railroad Company, to wit, Manhattan Produce Yards in the State of New Jersey; and said common carriers, at all times mentioned in this indictment, were

subject to the provisions of an Act of Congress, approved February 4, 1887, entitled "An Act to Regulate Commerce," and to the Acts of Congress amendatory thereof and supplementary thereto.

3. That throughout the period from, to wit, October 1, 1932, to, to wit, December 31, 1932, said The Pennsylvania Railroad Company and said other common carriers more particularly specified in the next succeeding paragraph of this count of this indictment, had printed and had published and had filed with the Interstate Commerce Commission schedules and tariffs of rates and charges which named and showed the joint through rate and charge for the transportation, over their joint through route aforesaid from said Quality through the Eastern District of Pennsylvania to Manhattan Produce Yards aforesaid, of grapes in lug boxes with or without tops, in carload lots subject to a minimum carload weight of, to wit, 26,000 pounds, to be 173 cents for each 100 pounds thereof.

4. That on, to wit, October 15, 1932, Southern Pacific Com-
3 pany, Union Pacific Railroad Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, The Alton Railroad Company, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 4221; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

5. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $282.24, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

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COUNT 2

1. The facts set forth in paragraph numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 15, 1932, Southern Pacific Company, Union Pacific Railroad Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, The Alton Railroad Company, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 27465; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit: $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and

5 cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $302.09, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

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COUNT 3

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 17, 1932, Southern Pacific Company, Union Pacific Railroaod Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, The Alton Railroad Company, The Belt Railway Company of Chicago, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through

route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 15202; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The
7 Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $385.03, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States

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COUNT 4

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 17, 1932, Southern Pacific Company, Union Pacific Railroad Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, The Alton Railroad Company, The Belt Railway Company of Chicago, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 36867; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of,

to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive,

9 and cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $385.23, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

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COUNT 3

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 17, 1932, Southern Pacific Company, Union Pacific Railroad Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, The Alton Railroad Company, The Belt Railway Company of Chicago, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 32514; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive,

11 and cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $384.23, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby the said property was transported from said Quality, through the

Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such made and provided and against the peace and dignity of the United States.

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COUNT 6

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 21, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Terminal Railroad Association of St. Louis, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 900 Lugs of grapes of an aggregate weight of, to wit, 26,100 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 19351; that on, to wit, November 2, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $451.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The

13 Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $479.25, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

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COUNT 7

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 22, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Union Railway Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, Toledo, Peoria & Western Railroad, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Indiana Harbor Belt Railroad Company, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 38371; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc. and Arpaxat Setrakian, and
15 each of them unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $459.90, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

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COUNT 4

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 23, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Union Railway Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, Toledo, Peoria & Western Railroad, Chicago, Milwaukee, St. Paul and Pacific Railroad Company,

Indiana Harbor Belt Railroad Company, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 109; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian,
17 and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $402.31, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

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COUNT 9

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 24, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Union Railway Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, Toledo, Peoria & Western Railroad, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Indiana Harbor Belt Railroad Company, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 71433; that on, to wit, December 10, 1932, at said Manhattan

Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipments, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive,

19 and cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $341.78, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

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COUNT 10

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 24, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Terminal Railroad Association of St. Louis, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 900 lugs of grapes of an aggregate weight of, to wit, 26,100 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 33483; that on, to wit, November 2, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $451.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The

21 Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $325.35, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

22 COUNT 11

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 25, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Union Railway Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, Toledo, Peoria & Western Railroad, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Indiana Harbor Belt Railroad Company, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 15750; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and
23 each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $302.09, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs

of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

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COUNT 12

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 26, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Union Railway Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, Toledo, Peoria & Western Railroad, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Indiana Harbor Belt Railroad Company, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 35385; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and

25 each of them unlawfully did knowingly solicit, accept and receive, and cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $321.93, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

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COUNT 13

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 27, 1932, Southern Pacific Company, Union Pacific Railroad Company, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 900 lugs of grapes of an aggregate weight of, to wit, 26,100 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 13763; that on, to wit, December 11, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $451.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The
27 Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $431.12, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

28 COUNT 14

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 27, 1932, Southern Pacific Company, Union Pacific Railroad Company, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 71674; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight

charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter, on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The
29 Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $350.60, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

30

COUNT 15

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 22, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Terminal Railroad Association of St. Louis, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 900 lugs of grapes of an aggregate weight of, to wit, 26,100 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 71860; that on, to wit, November 2, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $451.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc. and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received from said The
31 Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $387.90, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality,

through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

32 COUNT 16

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 28, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, Toledo, Peoria & Western Railroad, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Indiana Harbor Belt Railroad Company, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 35349; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc. and Arpaxat Setrakian,
33 and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $321.93, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

34

COUNT 17

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 30, 1932, Southern Pacific Company, Union Pacific Railroad Company, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, and said The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 33508; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the

35 amount of, to wit, $321.93, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

36

COUNT 18

1. The facts set forth in paragraphs numbered 1 and 2 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That throughout the period from, to wit, October 1, 1932, to, to wit, December 31, 1932, said defendant and said other common carriers more particularly specified in the next succeeding paragraph of this count of this indictment, had printed and had published and had filed with the Interstate Commerce Commission schedules and tariffs of rates and charges which named and showed the joint through rate and charge for the transportation, over their joint through route aforesaid from said Fresno through the Eastern District of Pennsylvania to Manhattan Produce Yards aforesaid, of grapes in lug boxes

with or without tops, in carload lots subject to a minimum carload weight of, to wit, 26,000 pounds, to be 173 cents for each 100 pounds thereof.

3. That on, to wit, October 23, 1932, Southern Pacific Company, Union Pacific Railroad Company, Chicago Great Western Railroad Company, Indiana Harbor Belt Railroad Company, and said The Pennsylvania Railroad Compny, did transport from said Fresno, over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 930 lugs of grapes of an aggregate weight of, to wit, 26,970 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 32223; that on, to wit, November 1, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Com-
37 pany, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $466.58, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

4. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc. and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $474.50, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Fresno, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

38 COUNT 19

1. The facts set forth in paragraphs numbered 1 and 2 of Count 1 and paragraph numbered 2 of Count 18 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 25, 1932, The Atchison, Topeka and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, and said The Pennsylvania Railroad Company, did transport from said Fresno over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 930 lugs of grapes of an aggregate weight of, to wit, 26,970 pounds, that being a carload lot, loaded in and upon a car bearing the initials and numbered SFRD 25366; that on, to wit,

November 3, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $466.58, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc. and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $474.30, in respect to the aforesaid transportation of
39 said shipment of property by said common carriers, whereby said property was transported from said Fresno, through the Eastern District of Pennsylvania and within the Jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

40 COUNT 20

1. The facts set forth in paragraphs numbered 1 and 2 of Count 1 and paragraph numbered 2 of Count 18 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 26, 1932, Southern Pacific Company, Union Pacific Railroad Company, Chicago Great Western Railroad Company, Indiana Harbor Belt Railroad Company, and said The Pennsylvania Railroad Company, did transport from said Fresno over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 930 lugs of grapes of an aggregate weight of, to wit, 26,970 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 15848; that on, to wit, November 3, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $466.58, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and

cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount
41 of, to wit, $474.30, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Fresno, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

42 COUNT 21

1. The facts set forth in paragraphs numbered 1 and 2 of Count 1 and paragraph numbered 2 of Count 18 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 26, 1932, Southern Pacific Company, Union Pacific Railroad Company, Chicago Great Western Railroad Company, The Belt Railway Company of Chicago, and said The Pennsylvania Railroad Company did transport from said Fresno over their joint through route aforesaid to said Manhattan Produce Yards for said Midstate as consignor certain property, to wit, 930 lugs of grapes of an aggregate weight of, to wit, 26,970 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 33162; that on, to wit, December 9, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $466.58, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and
cause to be solicited, accepted, and received, from said The
43 Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $453.38, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Fresno, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

44

COUNT 22

1. The facts set forth in paragraphs numbered 1 and 2 of Count 1 and paragraph numbered 2 of Count 18 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 27, 1932, Southern Pacific Company, Union Pacific Railroad Company, Chicago Great Western Railroad Company, Indiana Harbor Belt Railroad Company, and said The Pennsylvania Railroad Company, did transport from said Fresno over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 930 lugs of grapes of an aggregate weight of, to wit, 26,970 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 71993; that on, to wit, December 9, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $466.58, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter, on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept and receive, and cause to be solicited, accepted and received, from said The Pennsylvania Railroad Company, a rebate and concession in the

45 amount of, to wit, $495.23, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Fresno, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid: contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

46

COUNT 23

1. The facts set forth in paragraphs numbered 1 and 2 of Count 1 and paragraph numbered 2 of Count 18 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 28, 1932, Southern Pacific Company, Union Pacific Railroad Company, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, and said The Pennsylvania Railroad Company, did transport from said Fresno over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 930

lugs of grapes of an aggregate weight of, to wit, 26,040 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 38987; that on, to wit, December 11, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $450.49, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The
47 Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $453.38, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Fresno, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

48 COUNT 24

1. The facts set forth in paragraphs numbered 1 and 2 of Count 1 and paragraph numbered 2 in Count 18 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 28, 1932, The Atchison, Topeka and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, and said The Pennsylvania Railroad Company, did transport from said Fresno over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 930 lugs of grapes of an aggregate weight of, to wit, 26,970 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number SFRD 26301; that on, to wit, December 11, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $466.58, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc. and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The

49 Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $453.38, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Fresno, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

50

COUNT 25

1. The facts set forth in paragraphs numbered 1 and 2 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That throughout the period from, to wit, October 1, 1932, to, to wit, December 31, 1932, said The Pennsylvania Railroad Company and said other common carriers more particularly specified in the next succeeding paragraph of this count of this indictment, had printed and had published and had filed with the Interstate Commerce Commission schedules and tariffs of rates and charges which named and showed the joint through rate and charge for the transportation, over their joint through route aforesaid from said Conejo through the Eastern District of Pennsylvania to Manhattan Produce Yards aforesaid, of grapes in lug boxes with or without tops, in carload lots subject to a minimum carload weight of, to wit, 26,000 pounds, to be 173 cents for each 100 pounds thereof.

3. That on, to wit, October 27, 1932, The Atchison, Topeka and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, and said The Pennsylvania Railroad Company, did transport from said Conejo over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 930 lugs of grapes of an aggregate weight of, to wit, 26,040 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number SFRD 15793; that on, to wit, November 6, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The

51 Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $450.49, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

4. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $474.40, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Conejo, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

52 COUNT 26

1. The facts set forth in paragraphs numbered 1 and 2 of Count 1 and paragraph numbered 2 of count 25 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 29, 1932, The Atchison, Topeka and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, and said The Pennsylvania Railroad Company, did transport from said Conejo over their joint route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 930 lugs of grapes of an aggregate weight of, to wit, 26,970 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number SFRD 18 559; that on, to wit, December 11, 1932, at said Manhattan Produce Yards, said The Pennsylvania Railroad Company, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said The Pennsylvania Railroad Company did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $466.58, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $453.38, in respect to the aforesaid transportation of
53 of said shipment of property by said common carriers, whereby said property was transported from said Conejo, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less

rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(S) J. CULLEN GAINEY,
Acting United States Attorney.

PHILADELPHIA, PA., *March 5th, 1937.*

No. 7380. December Sessions, 1936. United States District Court, Eastern District of Pennsylvania. The United States of America vs. Midstate Horticultural Company, Inc., and Arpaxat Setrakian. True bill. H. R. Bassler, Foreman.

54 In United States District Court

[Title omitted.]

Motion for bill of particulars

Filed May 27, 1937

Now comes Arpaxat Setrakian and Midstate Horticultural Company, Inc., named as defendants in the indictment filed in the above proceedings, by their attorney, Samuel L. Einhorn, Esq., and move the Court for an order requiring the United States of America to furnish to said defendants within a time to be therein limited, a written bill of particulars of the matters embraced within the indictment as follows:

1. Set forth the Title, Chapter, Section, and Subdivision of the law, Statute or Act of the United States, which it is charged that each of the defendants violated, and upon which the indictment herein is founded.

2. Set forth the Titles, Numbers, Chapters, Sections, and Subdivisions of the Schedules and Tariffs of rates and charges in effect at the time in question, and filed with the Interstate Commerce Commission covering transportation by the Pennsylvania Railroad Company, and the other common carriers by railroad operating joint through routes with said Pennsylvania Railroad Company, over whose lines said shipment of grapes was carried, specifically indicating the tariffs and rates chargeable for the transportation of the shipments in question over the lines of each communicating carrier and the joint through rate and charge for each entire transportation, and

55 each and every manner in which the defendants departed from such rate.

3. Set forth the exact manner in which said shipments of the lugs of grapes contained in each car were transported by said common carriers, stating specifically the condition in which the lugs of grapes in each car were received, and their condition when delivered by the

carrier, and the damage, if any, to each shipment from the shipping point to point of destination.

4. Set forth the exact date, time, and place when and where it is charged that each of the defendants individually solicited, received, and accepted a rebate and concession from the Pennsylvania Railroad Company in connection with each shipment of grapes alleged in the indictment, together with the names of the persons acting on behalf of each defendant and from whom on behalf of the Pennsylvania Railroad Company said rebates and concessions were solicited, received, and accepted, stating whether the solicitation or solicitations charged to the defendants or either of them was written or oral; if written, set forth exact copies thereof with respect to each defendant; if oral, set forth the complete substance thereof with respect to each defendant.

5. Set forth each and every manner and form in which the alleged solicitation was effected, and the manner and form in which each alleged rebate and concession charged in the indictment was received and accepted by each of the defendants individually, stating specifically whether each of said alleged rebates and concessions was received pursuant to written or oral agreements; if written, set forth exact copies thereof; if oral, state the complete substance thereof, together with the time or times when and the place or places where it it is alleged said agreements were made as to each of the defendants and said rebates were received and accepted by each of the defendants, and the names of the persons acting on behalf of the respective parties.

56 6. State whether each alleged solicitation and the receipt and acceptance by the defendants of each rebate and concession charged in the indictment was made in connection with a claim for damage to each shipment or shipments, filed by the defendants or either of them, and the payment of such claim by the Pennsylvania Railroad Company or any of the other common carriers over whose lines said shipment or shipments was transported, specifying which of the defendants filed such claim or claims, and to which of said defendants said payment was made.

7. If it is charged that the said alleged rebates and concessions were made in connection with the filing of claims for damage by the defendants or either of them, then state in what manner, if any, such claim or the payments thereof were illegal or unlawful, and in what manner same constituted a rebate or concession or a solicitation of a rebate or concession, specifying which of the defendants filed the claim, and which of the defendants obtained the rebate.

8. If it is charged that the said alleged rebates and concessions were made in connection with the filing of claims by the defendants or either of them, state whether it is contended or claimed by the plaintiff that the payments of such claims were illegal or unjustified, and if so, in what manner or respect said payments were unjustified or illegal, and if it is claimed or contended that the payments of

such claims were in excess of the amount of damage suffered by the defendants or either of them, then set forth in detail the amount of damage suffered by the defendants or either of them and the excess, if any, paid by the Pennsylvania Railroad Company to the defendants or either of them in respect to each car mentioned in the said indictment.

57 9. State the exact date on which it is alleged that the defendants paid the freight charges on said transportation, stating specifically which of said defendants made the payment.

10. State whether the alleged rebate or rebates were paid by the Pennsylvania Railroad Company to the defendants or either of them in cash or by check; the exact date, time, and place when and where such payment or payments were made; if more than one payment, the respective amounts paid at the respective times and places; if by check or checks, the date or dates of such checks, the amount or amounts of such checks and the persons paying and receiving such payments and on whose behalf.

And for such other and further relief as to the Court shall seem meet.

Dated Philadelphia, Pa., May 26th, 1937.

Yours, &c.

(S) SAMUEL L. EINHORN,
Attorney for Defendants,
Office & P. O. Address 12 South Twelfth Street,
Philadelphia, Pennsylvania.

58 In United States District Court

[Title omitted.]

Affidavit of Arpaxat Setrakian

STATE OF NEW YORK,
City of New York, County of New York:

Arpaxat Setrakian being duly sworn, deposes and says: I am one of the parties defendant to the above entitled indictment and am also an officer of the Midstate Horticultural Company, Inc., which is also a party defendant. I declare and aver that I have made a complete statement of the facts to my attorney, Samuel L. Einhorn, Esq., and that he advises me on my statement of facts that I am not guilty of the crime or crimes with which I am charged, and I believe this to be true. That my attorney advises me that the indictment does not set forth clearly and distinctly the issues upon which the Government relies, and that the indictment speaks in language so general that he is unable to properly and adequately prepare my defense.

There are various charges declared in the indictment with which I am unfamiliar, and I declare under oath that I am ignorant of the acts and facts charged to me and to the corporate defendant. Since your deponent was general manager as well as officer of the

Midstate Horticultural Company, Inc., and is unfamiliar with the acts charged to both the corporate defendant and to myself, it is obvious that neither the corporate defendant nor I am in a position to make adequate preparation for the trial.

My attorney advises me that in none of the proposed demands is he asking for any evidence now in the Government's possession. That all of the particulars requested are limited to the issues involved in this transaction.

59 Wherefore, I respectfully pray that a bill of particulars be granted setting forth the various items as contained in the motion for a bill of particulars annexed hereto.

(s) ARPAXAT SETRAKIAN.

Sworn to before me this 26th day of May, 1937.

(s) IDA DAVIS HAUSER.

Commissioner of Deeds, N. Y. City,
N. Y. Co. Clk's No. 88, Reg. No. 81-18,
Kings Co. Clk's No. 58, Reg. No. 8008.

Term expires Jan. 28, 1938.

60 [Copy of indictment omitted. Printed side page. 1 ante.]

64 In United States District Court

[Title omitted.]

Order granting motion for bill of particulars

Filed December 15, 1937

And now, December 15th, 1937, after hearing counsel for plaintiff and defendants and due consideration had, it is

Ordered and decreed that the defendants in each of the above entitled cases be furnished with a Bill of Particulars.

By the Court.

WELSH, *J.*

65 In United States District Court

[Title omitted.]

Bill of particulars

Filed March 21, 1938

Now comes J. Cullen Ganey United States Attorney in and for the Eastern District of Pennsylvania, and in compliance with the order of this Honorable Court dated December 15, 1937, requiring the Government to furnish a bill of particulars with regard to certain matters alleged in the indictment herein, says:

(1. Question.) Where was the crime committed?

1. Answer. It is assumed that defendants desire to know where the check by which payment of all rebates alleged in the 26 counts of the indictment was handed by a representative of the Pennsylvania Rail-

road Company to a representative of the Midstate Horticultural Company, Inc., and therefore states that the check in payment of all the rebates alleged in the said 26 counts of the indictment was given by a representative of the said Railroad Company to A. Setrakian, Vice-President, Secretary, and General Manager of the Midstate
66 Horticultural Company in the City of New York, State of New York. All of which was stated at the bar of the Court by Francis Biddle, Esquire, counsel for the Pennsylvania Railroad Company.

(2. Question.) How was rebate paid?

2. Answer. Each of the rebates specified in the 26 counts of the indictment were included in one check in the amount of $10,826.46, dated May 15, 1935, and drawn by the Treasurer of the Pennsylvania Railroad Company to the order of Midstate Horticultural Company, Inc.

(3. Question.) Why was it a rebate?

3. Answer. The Government contends that the Pennsylvania Railroad Company paid the loss and damage claim or claims filed against each carload shipment of Midstate Horticultural Company, Inc., without carrier liability for the alleged loss and damage, and that these claims were filed by the said Midstate Horticultural Company, Inc. and paid by the Pennsylvania Railroad Company as a convenient method of soliciting and granting a rebate or rebates.

All other matters and questions set forth in defendants' motion for bill of particulars having been abandoned by counsel for the defendants at the bar of the Court, no further answer is being made.

J. CULLEN GANEY,
United States Attorney.

67 In United States District Court

[Title omitted.]

Demurrer

Filed April 7, 1938

And now, to wit, April 6th, 1938, comes Midstate Horticultural Company, Inc. and Arpaxat Setrakian, defendants in the above entitled cause, by their attorney, Samuel L. Einhorn, Esq., and demur to the indictment returned against them in the above numbered and entitled cause, and for grounds for their demurrer to said indictment say:

1. The said indictment and the matters therein contained in manner and form as the same are therein stated are not sufficient in law, and the defendants are not bound by the law of the land to answer the same. This they are ready to verify.

2. The indictment does not allege any facts which constitute an offense against the laws of the United States.

3. The indictment does not allege any facts which give this court jurisdiction over defendants in this matter; in that it is alleged in Counts 1 to 26 inclusive of the indictment, that on May 15,
68 1935, defendants did knowingly solicit, accept, and receive and cause to be solicited, accepted, and received from the Pennsylvania Railroad Company certain rebates in respect to the transportation of certain shipments, but it is not stated in the indictment that the rebate was received within the jurisdiction of this court, or in what jurisdiction payment was received, and it further appears in all of the Counts of the Indictment that the transportation of the various shipments had terminated more than two years prior to the date of receipt of payment of the alleged rebate.

Wherefore for want of sufficient indictment, defendants pray judgment on each and every Count of the indictment and that the same may be quashed.

(S) SAMUEL L. EINHORN,
Attorney for Defendants.

69 In United States District Court, Eastern District of Pennsylvania

No. 7380. December Sessions, 1936

UNITED STATES OF AMERICA

vs.

MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN

No. 7382. December Sessions, 1936

UNITED STATES OF AMERICA

vs.

THE PENNSYLVANIA RAILROAD COMPANY

Opinion sur demurrers to indictments

Filed June 16, 1938

70 WELSH, J.: The question is solely one of jurisdiction as to whether or not this is the proper district in which the case should be tried. The Act (49 U. S. C. A., Sec. 41) provides, in part, as follows:

"Every violation of this section shall be prosecuted in any Court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted. * * *"

71 In Section 1 of the above referred to Act, the crime is defined as follows:

"Every person or corporation whether carrier or shipper, who shall knowingly offer, grant, or give, or solicit, accept, or receive, any such

rebate, concession, or discrimination, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000."

72 This is an indictment for rebates alleged to have been given by the Pennsylvania Railroad Company, hereinafter referred to as the Railroad, to Midstate Horticultural Company, Inc., the shipper, hereinafter referred to as Midstate. The Government filed two indictments growing out of these transactions, one against the railroad and one jointly against Midstate and Arpaxat Setrakian. The shipment covered grapes and they were shipped from various points in the West to New York. Thereafter, by reason of damage to the shipment, it became necessary for the grapes to be sold. It is alleged by the railroad that the check subsequently given to Arpaxat Setrakian was an adjustment of this loss incurred by the shippers. It is proper to mention that the full lawful rates were paid for the transportation of the various shipments, all of which terminated more than two years prior to the date of payment of the alleged rebate.

73 In an argument before the Court on the question of where the crime took place and the nature of the rebate, the Court ordered that a bill of particulars be filed. In reply thereto, the United States filed a bill of particulars stating that * * * "the check was in effect given by the Pennsylvania Railroad Company to Mr. Setrakian in the City of New York, New York * * *"

74 Both sides to this controversy have filed very illuminating briefs and the case argued most ably by counsel. The briefs quite extensively cite leading cases on the subject of rebates and there is, undoubtedly, some conflict of authority between the decisions of the lower courts. This Court, however, is of the opinion that our construction of the case hinges entirely on the question of jurisdiction.

If any violation of the law occurred as alleged, the case should be tried in New York. The Court is of the opinion that under all of the facts, jurisdiction is not in this Court, and, so holding, the demurrers are sustained.

75 In United States District Court for the Eastern District of Pennsylvania

No. 7380. December Sessions, 1936

UNITED STATES OF AMERICA

vs.

MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN

Order sustaining demurrer etc.

Filed June 22, 1938

And now, to wit: this 21st day of June A. D. 1938, it is ordered that the Demurrer to the Indictment in the above entitled cause be

and the same is hereby sustained and defendants discharged without day.

By the Court.

(S) WELCH, *J.*

76 In United States District Court for the Eastern District of Pennsylvania

[Title omitted.]

Petition for appeal

Filed July 20, 1938

United States of America, plaintiff, by its counsel, now comes and says that on June 21, 1938, this court rendered its judgment in favor of the defendants against the plaintiff, in which judgment and proceedings had prior thereto in said cause certain errors were committed to the prejudice of the plaintiff, all of which more fully appear from the assignment of errors herewith filed.

Wherefore, United States of America prays that an appeal may issue in its behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in said cause, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

(S) J. CULLEN GAINEY,
United States Attorney.

Dated this 20th day of July, 1938.

(S) EDWARD A. KALLICK,
Assistant U. S. Attorney.

77 In United States District Court

[Title omitted.]

Order allowing appeal

Filed July 20, 1938

United States of America, plaintiff, having by its counsel made and filed its petition praying an appeal to the Supreme Court of the United States from the final judgment of this Court rendered June 21, 1938, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided:

It is ordered and adjudged that the appeal be and the same is hereby allowed as prayed and made returnable within forty (40) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings,

and papers on which said final judgment was made and entered to the Supreme Court of the United States.

This 20th day of July 1938.

(S.) W. H. KIRKPATRICK,
United States District Judge.

78 In United States District Court

[Title omitted.]

Assignment of errors

Filed July 20, 1938

United States of America, plaintiff, by its counsel, now comes and, in connection with its petition for an appeal, files the following assignment of errors upon which it will rely in its appeal to the Supreme Court of the United States from the judgment rendered by this Court on June 21, 1938.

The District Court erred:

1. In sustaining the demurrer to the indictment.
2. In not overruling the demurrer to the indictment.
3. In holding and adjudging that jurisdiction of the offenses charged in the indictment does not lie in the United States District Court for the Eastern District of Pennsylvania.
4. In failing to construe Section 1 of the Elkins Act (49 U. S. C. A. Section 41), the statute upon which the indictment is founded, as fixing jurisdiction of the offenses charged in the indictment in the United States District Court for the Eastern District of Pennsylvania.
5. In holding and adjudging that jurisdiction of the offenses charged in the indictment lies solely in the United States District Court for the Southern District of New York.
6. In entering the order sustaining the demurrer of the indictment.

(Sgd.) J. CULLEN GANEY,
United States Attorney.
(Sgd.) EDWARD A. KALICK,
Ass't U. S. Attorney.

Dated this — day of July 1938.

Service of a copy of the foregoing assignment of errors is hereby acknowledged this — day of July 1938.

———— ————,
Attorney for defendant.

79 [Citation in usual form showing service on Samuel L. Eirhorn, filed July 26, 1938, omitted in printing.]

80 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed July 20, 1938

To the CLERK OF THE DISTRICT COURT:

Please transmit as the transcript of record in the above entitled case, the following pleadings, documents, and records to the Supreme Court of the United States:

1. Indictment.
2. Motion for bill of particulars.
3. Order granting motion for bill of particulars.
5. Bill of particulars.
6. Demurrer to indictment.
7. Opinion of the court sustaining the demurrer.
8. Order on opinion sustaining the demurrer.
9. Petition for appeal.
10. Assignment of errors.
11. Statement as to jurisdiction.
12. Order allowing appeal.
13. Notice of service on appellee of petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction.
14. Citation on appeal.
15. All docket entries in their proper order.
16. Praecipe for transcript of record.
17. Clerk's Certificate.

(S) J. CULLEN GANZY,
United States Attorney.
(S) EDWARD A. KALLICK,
Assistant U. S. Attorney.

81 [Clerk's certificate to foregoing transcript omitted in printing.]

82 Supreme Court of the United States

Statement of points and designation of record to be printed

Filed August 23, 1938

I

United States of America, appellant, states that in its brief and oral argument on its appeal in the above-entitled cause it will rely upon the points stated in its assignment of errors therein.

II

The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellant, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

ROBERT H. JACKSON,
Solicitor General.

AUGUST 19TH, 1938.

Service of a copy of the above Statement of Points and Designation of Record to be Printed acknowledged August 19th, 1938.

WALTER SCHACHTEL,
For Einhorn & Schachtel, Counsel for Appellees.

[File endorsement omitted.]

[Endorsement on cover:] File No. 42,771. E. Pennsylvania D. C. U. S. Term No. 286. The United States of America, Appellant, vs. Midstate Horticultural Company, Inc., and Arpaxat Setrakian. Filed August 19, 1938. Term No. 286 O. T. 1938.

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No. 296

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, APPELLANT

vs.

MIDSTATE HORTICULTURAL COMPANY, INC., AND AHPAXAT SHIRAKIAN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Eastern District of Pennsylvania

No. 7380

UNITED STATES OF AMERICA, PLAINTIFF

v.

MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN, DEFENDANTS

STATEMENT AS TO JURISDICTION

[Filed July 20th, 1938]

In compliance with Rule 12 of the Supreme Court of the United States as amended, United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause.

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Section 682, of the United States Code, otherwise known as the Criminal Appeals Act, and by Section 345, Title 28 of the United States Code.

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B. The statute of the United States, the construction of which is involved herein is the Act of February 19, 1903, c. 708, 32 Stat. 847 (re-enacted in Section 2 of the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 587); 49 U. S. C. A., Section 41 (1), otherwise known as the Elkins Act, section 1 of which (a) declares it to be a misdemeanor for any person or corporation to offer, grant or give, or to solicit, accept, or receive a rebate, concession, or discrimination in respect to the transportation of property in interstate commerce by any common carrier subject to the Act to regulate commerce whereby such property shall by any device whatever be transported at less than the published rate, and (b) provides that—

> Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one district and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

C. The judgment of the District Court sought to be reviewed was rendered on June 21, 1938, and an application for appeal was presented and allowed on July 20, 1938.

D. The indictment alleges that the defendants solicited, accepted, and received from The Pennsylvania Railroad Company, in respect to interstate shipments of property which that company and other common carriers by railroad transported for appellees as consignors thereof, rebates and concessions whereby such property was transported at less than the published and filed rate through the Eastern District of Pennsylvania and within the jurisdiction of the United States District Court for the Eastern District of Pennsylvania.

A demurrer to the indictment was filed by the defendants and was sustained by the District Court solely on the ground that the offenses charged, if they actually existed, were committed at New York, N. Y., where the Railroad Company's agent handed to the defendants a check for the amount of the rebates and hence that jurisdiction thereof was in the District Court for the Southern District of New York and not in the District Court for the Eastern District of Pennsylvania.

E. The question involved is substantial. The construction placed by the District Court upon the jurisdictional provision of the Elkins Act is contrary not only to the language of the Act but also to the practical interpretation through prosecutions for violations of the Act since the date of its enactment. The District Court's construction would seriously interfere with and render far more

difficult the future administration and enforcement of the Act.

F. The following decisions are believed to sustain the jurisdiction of the Supreme Court to entertain this appeal:

> *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Nixon*, 235 U. S. 231; *United States* v. *Hastings*, 296 U. S. 188; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304.

A copy of the District Court's opinion filed June 16, 1938, is appended hereto.

Respectfully submitted.

(Sgd.) N. A. Townsend,
N. A. Townsend,
Acting Solicitor General.

(Sgd.) J. Cullen Ganey,
J. Cullen Ganey,
United States Attorney.

(Sgd.) Edward A. Kallick,
Assistant U. S. Attorney.

July 1938.

In the District Court of the United States for the Eastern District of Pennsylvania

No. 7380

UNITED STATES OF AMERICA

vs.

MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN

[December Sessions, 1936]

No. 7382

UNITED STATES OF AMERICA

vs.

THE PENNSYLVANIA RAILROAD COMPANY

[December Sessions, 1936]

SUR DEMURRERS TO INDICTMENTS

(Filed June 16th, 1938)

WELSH, J.:

The question is solely one of jurisdiction as to whether or not this is the proper district in which

the case should be tried. The Act (49 U. S. C. A., Sec. 41) provides, in part, as follows:

> Every violation of this section shall be prosecuted in any Court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted. * * *

In Section 1 of the above referred to Act, the crime is defined as follows:

> Every person or corporation whether carrier or shipper, who shall knowingly offer, grant, or give, or solicit, accept, or receive, any such rebate, concession, or discrimination, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000.

This is an indictment for rebates alleged to have been given by the Pennsylvania Railroad Company, hereinafter referred to as the Railroad, to Midstate Horticultural Company, Inc., the shipper, hereinafter referred to as Midstate. The Government filed two indictments growing out of these transactions, one against the railroad, and one jointly against Midstate and Arpaxat Setrakian. The shipment covered grapes and they were shipped from various points in the West to New York. Thereafter, by reason of damage to the shipment, it became necessary for the grapes to be sold. It is alleged by the railroad that the check subse-

quently given to Arpaxat Setrakian was an adjustment of this loss incurred by the shippers. It is proper to mention that the full lawful rates were paid for the transportation of the various shipments, all of which terminated more than two years prior to the date of payment of the alleged rebate.

In an argument before the Court on the question of where the crime took place and the nature of the rebate, the Court ordered that a bill of particulars be filed. In reply thereto, the United States filed a bill of particulars stating that * * * "the check was in effect given by the Pennsylvania Railroad Company to Mr. Setrakian in the City of New York, New York * * *."

Both sides to this controversy have filed very illuminating briefs and the case argued most ably by counsel. The briefs quite extensively cite leading cases on the subject of rebates and there is, undoubtedly, some conflict of authority between the decisions of the lower courts. This Court, however, is of the opinion that our construction of the case hinges entirely on the question of jurisdiction.

If any violation of the law occurred as alleged, the case should be tried in New York. The Court is of the opinion that under all of the facts, jurisdiction is not in this Court, and, so holding, the demurrers are sustained.

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No. 286

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, APPELLANT

v.

MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 286

THE UNITED STATES OF AMERICA, APPELLANT

v.

MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

The United States District Court for the Eastern District of Pennsylvania, by its judgment made and entered on June 21, 1938, sustained a demurrer to a joint indictment in twenty-six counts charging appellees with soliciting and receiving rebates in violation of the Elkins Act (U. S. C., Title 49, Sec. 41).

Each count of the indictment charges that in the fall of 1932 certain common carriers by railroad, including the Pennsylvania Railroad Company, transported from a point in the State of California

through the Eastern District of Pennsylvania to a point in the State of New Jersey certain property for the appellee Midstate Horticultural Company, Inc.: that the Pennsylvania Railroad Company collected from said Midstate Company the proper transportation charges for the shipment; and that thereafter on May 15, 1935, the appellees, the Midstate Company and Arpaxat Setrakian, its officer and agent, "unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted and received, from said Pennsylvania Railroad Company, a rebate and concession (in specified amount) in respect to the aforesaid transportation * * * whereby said property was transported * * * through the Eastern District of Pennsylvania and within the jurisdiction of this court * * * at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid * * *." The rebates charged by the several counts of the indictment total $10,826.46.

In a bill of particulars ordered by the court the United States stated that one check, to the order of the Midstate Company in payment of all the rebates, was given by the Railroad Company to the appellee Setrakian in the City of New York.

A demurrer was filed to the indictment, and in an opinion filed June 16, 1938, the District Court being "of the opinion that our construction of the case hinges entirely on the question of jurisdi-

tion," held that "if any violation of law occurred as alleged, the case should be tried in New York" and that "jurisdiction is not in this Court, and, so holding, the demurrers are sustained."

On June 21, 1938, the court rendered and entered the following judgment entitled "Order": "AND NOW, to wit: this 21st day of June, A. D. 1938, it is ORDERED that the Demurrer to the Indictment be, and the same is hereby, sustained and defendants discharged without day." From that judgment the United States, on July 20, 1938, petitioned for and was allowed an appeal under the Criminal Appeals Act (U. S. C., Title 18, Sec. 682).

On August 3, 1938, appellees filed in the District Court a statement against jurisdiction, reciting two grounds: (1) that "the appeal was not taken within thirty days after the decision had been rendered by the District Court on June 16, 1938," and (2) that "the decision of the District Court of June 16, 1938, sustaining the demurrer, is not based on the invalidity or construction of the statute upon which the indictment is founded." With the statement against jurisdiction appellees filed a motion to dismiss the appeal on the first ground alone, ignoring the second, and a motion to affirm on the ground that the decision below is "in accordance with the decisions of the Supreme Court."

I

Appellees' first ground making against jurisdiction, and the sole ground relied upon in the motion

to dismiss, is that this appeal was not taken within thirty days "after the decision had been rendered by the District Court on June 16, 1938." Their statement asserts that "The mere entry of the order of June 22, 1938, by the District Court, sustaining the demurrer, does not extend the time within which the appeal must be taken." Their view apparently is that because the opinion filed June 16, 1938, states that "the demurrers are sustained" the opinion and not the order of June 21, 1938, constitutes the lower court's "decision or judgment" within the meaning of the Criminal Appeals Act, and marks the beginning of the thirty-day period for appeals provided by that Act.

The Government's position is that the opinion filed by the lower court on June 16, 1938, is merely a statement of its reasons why the demurrer should be sustained, that the order entered June 21, 1938, is the "decision or judgment" for purposes of appeal, and that, even if the opinion be considered as an appealable "decision", the appeal here from the order or judgment entered June 21 was timely and properly taken because the Act permits an appeal from a decision *or* judgment.

The identical ground upon which appellees rely for the dismissal of this appeal was unsuccessfully urged upon this Court as a ground for dismissing two appeals under the Criminal Appeals Act from the Eastern District of Pennsylvania in *United States* v. *Resnick et al.* and *United States* v. *Acme*

Can Co., 299 U. S. 207; Nos. 62 and 63, Oct. Term, 1936, opinion rendered December 7, 1936. The records before this Court in those cases show that the District Court's opinion filed March 11, 1936, in the *Resnick* case, concluded: "* * * the Demurrer is, therefore, sustained" (R. No. 62, p. 7), and the opinion in the *Acme* case, that: "The demurrer to the indictment is sustained" (R. No. 63, p. 4). An "order sustaining demurrer" was entered April 14, 1936, in each case, reading "Ordered that the Demurrer to the Indictment in the above entitled cause be, and the same is hereby Sustained and the defendants discharged" without day (R. No. 62, p. 7; No. 63, p. 4). From those orders the appeals were allowed on April 14, 1936, thirty-four days after the opinions had been filed. The question whether the appeals were timely taken was argued to this Court by the Government in its brief in opposition to the motions to dismiss and in its main brief, and by the appellees, whose briefs argued at length that since the opinions concluded with the statement that the demurrers were "sustained" they were more than mere opinions and were in effect the judgments of the District Court for appellate purposes.

This Court entertained the appeals and rendered its opinion on the merits, and, although the opinion contains no discussion of the point, it rejects the contention of the appellees not only in necessary effect but also by express words of the last sentence

stating that: "The judgments sustaining the demurrers and discharging the accused must be affirmed." Since, as in the case at bar, the direction or mandate "discharging the accused" was in the orders, and not in the opinions, it is plain that this Court holds that the orders and not the opinions constitute the District Court's "decision or judgment" and mark the beginning of the thirty-day period for appeals under the Criminal Appeals Act.

As the pertinent words of the opinions and orders in those cases are almost identical to those of the opinion and order in the instant case, we submit that the contention of the appellees here is foreclosed by this Court's action and decision in those cases.

That the opinion or paper filed by the District Court in the instant case on June 16, 1938, is not and was not intended by that court as its judgment is clear: it was not entitled an "order" or "judgment" but, instead "Sur Demurrers to Indictments"; it did not discharge the defendants, though it stated that the demurrers were sustained; it was entered by the Clerk not as an order but as "Opinion, Welsh, J., sustaining demurrer"; and that docket entry is followed by the entry "Order of Court sustaining demurrer and discharging defendants filed."

It is equally clear that the order entered June 21, 1938, is and was intended by the court to be its

"decision or judgment" for appellate purposes; the order of June 21 was wholly unnecessary, and, indeed, was a nullity, if, as appellees contend, the paper filed June 16 was both the court's opinion and its judgment; the order is that the demurrer "be, and the same is hereby, sustained and defendants discharged without day," thus, finally terminating the cause in that court; the court's order allowing the appeal recites that the appeal is prayed from the "final judgment of this Court rendered June 21, 1938," and that the appeal "is hereby allowed as prayed."

While it is true that the use of particular words or form of words is not essential to constitute a judgment, and that the test is one of substance and not of form, it is also true that the intention of the court to render judgment must clearly appear. Freeman on Judgments (5th Ed.) I, § 69. The facts and circumstances in these cases clearly negative any intention on the part of the District Court to render judgment by the mere filing of its statement of reasons why the demurrer was sustained. Appellees' view compels the absurd conclusion that the District Court intended to, and did, render two judgments sustaining the demurrer.

A well reasoned opinion precisely in point is that in *Ogata* v. *Ogata*, 30 Hawaii 620 (1928). Section 2509, R. L. Hawaii, 1925, provided that in divorce cases "appeals shall be allowed from all decisions,

judgments, orders, or decrees." The opinion reads (pp. 621–622):

> It has been repeatedly held by this court that appeals under this statute must be taken from the decree and not from the decision (citing cases).
>
> No decree has been entered in the case at bar. While the document signed by the trial judge concludes with the definite statement that "the *libel is dismissed for want of jurisdiction,*" [emphasis supplied] it is obvious that it was intended merely as an opinion of the court—that which ordinarily is called a decision as distinguished from the decree. It is entitled "Decision" and not "Decree." This consideration alone, of course, would not alter the nature of the document, if it were in fact a decree, but it aids in showing the intention of the court. The document is in the ordinary form of an opinion or decision. It sets forth, even though briefly, the reasoning by which the court arrived at its conclusion that it was without jurisdiction to entertain the suit. It contains a citation of authority in support of the view adopted by the court. The mere fact that the concluding statement above quoted is in the form of an order does not render the document a decree. * * * In the present instance, there is no other language approximating that ordinarily used in a decree.
>
> The present appeal, therefore, having been taken solely from the decision and not from the decree, does not lie.

That the court below does not regard such a paper as was filed on June 16, 1938, as a "decision or judgment" is demonstrated by the long-continued practice in that court. Thus, the record before this Court in *United States* v. *Barnow*, 239 U. S. 74 (No. 454, October Term, 1915), discloses that an opinion of the court below was filed March 12, 1915, concluding: "The demurrer to the indictment is sustained." A judgment entry filed April 7, 1915, recited: "It is considered and adjudged that the said Barnow go hence without day * * * and that he be discharged from the said indictment and the premises, unless a writ of error be *taken within 30 days from the entry of this judgment* in accordance with the provisions of an Act of Congress, approved March 2, 1907 (34 Stat. 1246)." [Emphasis supplied.] The records in *United States* v. *Katz et al.*, 271 U. S. 354 (Nos. 726, 727, October Term, 1925) show that the court below allowed an appeal under the Criminal Appeals Act from a judgment entered on July 6, 1923, sixty-eight days after the filing of an opinion April 29, 1925, concluding: "the demurrers are therefore sustained and the indictments quashed." Under similar circumstances in 1936, the court below allowed appeals in the *Resnick* and *Acme* cases, *supra*. In the instant case that court again demonstrated that it considers such a paper as it filed in this case on June 16, 1938, to be a mere opinion and not a judgment, by allowing the appeal on July 20, 1938, from "the final judgment of this court rendered on

June 21, 1938." It would have been the duty of the court below to deny the appeals in all these instances if it construed such papers as that filed in this case on June 16, 1938, as its "decision or judgment. *Mach. Corp.* v. *Vogt Bros. Mfg. Co.*, 267 Fed. 934, aff'd, 267 Fed. 945 (writ of error, certiorari, and mandamus denied, 254 U. S. 607). This established practice and interpretation by the court below of its own papers has the force and effect of a rule of court, and is decisive here. *Fullerton* v. *United States Bank*, 1 Pet. 604, 612; *Duncan* v. *United States*, 7 Pet. 435, 451. *The Semaramis*, 50 F. (2d) 623.

The practice of this Court forecloses appellees' contention. Not only in the *Resnick* and *Acme* cases, *supra*, but in many other cases appealed under the Criminal Appeals Act, has this Court, by assuming jurisdiction, recognized that the phrase "decision or judgment" as used in that Act contemplates the formal order of judgment and not such a paper as was filed by the court below on June 16, 1938, notwithstanding the conclusion of such paper be couched in terms which might also be appropriate in a formal judgment. Illustrative cases, selected at random from the original records of this Court, are cited in the footnote.[1]

---

[1] *United States* v. *Bowman*, 260 U. S. 94, No. 69, October Term, 1922. An opinion, filed February 15, 1921, concluded: "Demurrer sustained" (R. 21). An order sustaining the

Even if the paper filed by the District Court on June 16, 1938, be construed as a "decision" within the meaning of the Criminal Appeals Act, nevertheless the appeal here was properly taken from the "judgment" of the court below entered on June 21, 1938. The language of the Act is in the disjunctive, and provides that the appeal shall be taken thirty days after the "decision *or* judgment has been rendered."

For the reasons stated we respectfully submit that the motion to dismiss should be denied.

---

demurrer and discharging the defendants from custody was entered on March 25 (R. 21). The writ of error was applied for and granted March 30, forty-three days after the filing of the opinion.

United States v. *Lanzo et al.*, 260 U. S. 377, No. 39, October Term, 1922. Opinion of court filed October 18, 1920, concluded: "The plea to No. 5245 and No. 5568 is sustained" (R. 21, 23). Formal order of dismissal was entered on Jan. 24, 1921 (R. 25, 26), and on February 2 the writ of error was applied for and granted ninety-eight days after the filing of the opinion. This Court reversed the decision of the lower court in that case.

United States v. *Katz and Senn*, 271 U. S. 354, No. 726, October Term, 1925. An opinion, filed April 29, 1925, concluded: "It is concluded that the indictments fail to set forth an indictable offense and the demurrers are therefore sustained and the indictments quashed" (R. 5). A judgment sustaining the demurrer (and ordering nothing further) was entered on July 6, and the writ of error was applied for and allowed on the same day, sixty-eight days after the filing of the opinion.

To the same effect see *United States* v. *Katz and Fenerstein*, 271 U. S. 354, No. 727, October Term, 1925.

II

The second ground recited in appellees' statement making against jurisdiction (but not relied upon as a ground for the motion to dismiss) is that the decision below was not based on the invalidity or construction of Section I of the Elkins Act. This contention is clearly without merit. *United States* v. *Nixon,* 235 U. S. 231, 235–236. Section I of the Elkins Act expressly specifies the courts in which violations of the Act shall be prosecuted. The District Court said in its opinion: "The question is solely one of jurisdiction as to whether or not this is the proper district in which the case should be tried." In view of the lower court's decision and the assignment of errors, the observation of this Court in *United States* v. *Keitel,* 211 U. S. 370, 386, is applicable here:

> * * * if the statutes which the court below construed be given the meaning which the United States by the assignments of error assert is the correct one, an offense against the United States was stated in both counts of the indictment. The construction of the statutes, therefore, is the real question for decision.

III

The question involved is substantial. The construction placed by the District Court upon the jurisdictional provision of Section I of the Elkins

Act is contrary not only to the express language of the Act, but also to the practical interpretation of the Act since the date of its enactment. It is not in accord with the decisions of this Court or of the lower federal courts. *Armour Packing Co.* v. *United States,* 209 U. S. 56, 72–77; *Northern Central Ry. Co.* v. *United States,* 241 Fed. 25, 29 (C. C. A. 2d); *Chicago, St. P., M. & O. Ry. Co. et al.* v. *United States,* 162 Fed. 835 (C. C. A. 8th).

For the reasons stated we respectfully submit that the motion to affirm should be denied.

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No. 286

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, APPELLANT

v.

MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court (R. 29, 30) has not yet been reported.

JURISDICTION

The order of the District Court sustaining the demurrer to the joint indictment was entered June 21, 1938 (R. 30). The appeal to this Court was applied for and allowed on July 20, 1938 (R. 31–32). The jurisdiction of this Court is conferred by the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682)

and Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 345). An order was entered by this Court on October 10, 1938, noting probable jurisdiction.[1]

QUESTION PRESENTED

The sole question presented on this appeal is whether or not the indictment charges the commission of an offense against the United States in the Eastern District of Pennsylvania, as it must, if appellees are to be prosecuted therein. *Constitution, Article 3, Section 2, Clause 3; Amendment VI.*

STATUTE INVOLVED

The pertinent provisions of the Elkins Act, Section 1, as amended, c. 3591, sec. 2, 34 Stat. 587 (U. S. C., Title 49, Sec. 41 (1)), are printed in the Appendix, infra, pp. 32–33.

---

[1] The order of October 10, 1938, reads as follows: "In these cases (the order being applicable also to two other cases, Nos. 287 and 295) probable jurisdiction is noted. Further consideration of the motions to dismiss or affirm is postponed to the hearing of the cases on the merits." The appellees' motion to dismiss was based solely upon one of the two grounds included in their statement opposing jurisdiction filed August 3, 1938. Inasmuch as the order of October 10, 1938, noting probable jurisdiction, covers both grounds which appellees urged against jurisdiction and therefore also the sole ground urged in respect to the motion to dismiss, it is assumed that the only matter deferred to the hearing of this case on the merits is the motion to affirm. Since this motion is based upon a single ground going to the merits, separate consideration is deemed unnecessary.

STATEMENT

On March 6, 1937, the grand jury impaneled for and in session during the December 1936 term of the United States District Court for the Eastern District of Pennsylvania presented an indictment (R. 2–24), in twenty-six counts, charging appellees with soliciting and receiving rebates and concessions in violation of Section 1 of the Elkins Act. Each count is identical in substance and, omitting certain details and formal allegations, alleges the following material facts obtaining during the period covered by the indictment:

(1) The Pennsylvania Railroad Company, in conjunction with other common carriers by railroad, operated joint through routes for the transportation of property from certain points in California, through the Eastern District of Pennsylvania, to Manhattan Produce Yards in New Jersey.

(2) These common carriers published tariffs naming rates for the transportation of carload shipments of grapes over the above routes, and specifying those rates to be 173 cents per 100 pounds, at a minimum carload weight of 20,000 pounds.

(3) These common carriers on a certain date did transport for appellee, Midstate Horticultural Company, Inc., as consignor, a carload shipment of grapes from one of the California points named,

over their joint through route as specified, to Manhattan Produce Yards, where the property was delivered to the consignee and the published freight charges collected from such appellee.

The last paragraph of each count is identical in every respect wth the excepton of the amount of the rebate and the California point of origin of the shipment. The last paragraph of Count 1 (R. 3) is here quoted:

> That thereafter on, to wit, May 15, 1935, said defendants, Midstate Horticultural Company, Inc., and Arpaxat Setrakian, and each of them, unlawfully did knowingly solicit, accept, and receive, and cause to be solicited, accepted, and received, from said The Pennsylvania Railroad Company, a rebate and concession in the amount of, to wit, $282.24, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

The rebates and concessions charged by the several counts of the indictment total $10,391.16.

In a bill of particulars ordered by the court, the Government stated (R. 27–28):

> (1. Question.) Where was the crime committed?
>
> 1. Answer. It is assumed that defendants desire to know where the check by which payment of all rebates alleged in the 26 counts of the indictment was handed by a representative of the Pennsylvania Railroad Company to a representative of the Midstate Horticultural Company, Inc., and therefore states that the check in payment of all the rebates alleged in the said 26 counts of the indictment was given by a representative of the said Railroad Company to A. Setrakian, Vice-President, Secretary, and General Manager of the Midstate Horticultural Company in the City of New York, State of New York. All of which was stated at the bar of the Court by Francis Biddle, Esquire, counsel for the Pennsylvania Railroad Company.

The defendants demurred to the indictment (R. 28, 29) upon the ground, among others, that (R. 29):

> 3. The indictment does not allege any facts which give this court jurisdiction over defendants in this matter; in that it is alleged in Counts 1 to 26, inclusive, of the indictment, that on May 15, 1935, defendants did knowingly solicit, accept, and receive and cause to be solicited, accepted, and received from the Pennsylvania Railroad

> Company certain rebates in respect to the transportation of certain shipments, but it is not stated in the indictment that the rebate was received within the jurisdiction of this court, or in what jurisdiction payment was received, and it further appears in all of the Counts of the Indictment that the transportation of the various shipments had terminated more than two years prior to the date of receipt of payment of the alleged rebate.

The District Court sustained the demurrer (R. 30, 31), its opinion (R. 29, 30) concluding:

> If any violation of the law occurred as alleged, the case should be tried in New York. The Court is of the opinion that under all of the facts, jurisdiction is not in this Court * * *.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

(1) In sustaining the demurrer to the indictment.

(2) In holding and adjudging that jurisdiction of the offenses charged in the indictment does not lie in the District Court of the United States for the Eastern District of Pennsylvania.

(3) In failing to construe Section 1 of the Elkins Act, the statute upon which the indictment is founded, as fixing jurisdiction of the offenses charged in the indictment in the District Court of

the United States for the Eastern District of Pennsylvania.

(4) In holding and adjudging that jurisdiction of the offenses charged in the indictment lies solely in the District Court of the United States for the Southern District of New York.

SUMMARY OF ARGUMENT

The offense charged by the indictment, as defined by the Elkins Act, does not consist merely of the act of receiving a rebate. The Elkins Act primarily forbids the accomplishment thereby of a specified result, namely, the obtaining of transportation in any district of the United States at less than tariff rates. It was the purpose of Congress, in so defining the offense, to make it constitutionally cognizable in any district "through which the transportation may have been conducted." A contrary construction of the Elkins Act will, by defeating this purpose, make an effective enforcement of the statute impossible. For the achievement of the result forbidden by the Act two events necessarily must occur: (1) transportation in some district of the United States and (2) the grant and acceptance of a rebate with respect thereto. Whether the rebate precedes the transportation or the transportation precedes the rebate, the forbidden result is nevertheless produced. The demurrer by admitting the occurrence of these two events establishes one indisputable fact—that appellees have suc-

ceeded in obtaining transportation in the Eastern District of Pennsylvania at less than tariff rates. This being true, that district is the district where the offense was committed within the meaning of the Sixth Amendment.[2] The physical presence of the offender in the district where the crime is deemed to have been committed is unnecessary.

ARGUMENT

I

THE OFFENSE CHARGED BY THE INDICTMENT, AS DEFINED BY THE ELKINS ACT, DOES NOT CONSIST MERELY OF THE ACT OF RECEIVING A REBATE. THE ELKINS ACT PRIMARILY FORBIDS THE ACCOMPLISHMENT THEREBY OF A SPECIFIED RESULT, NAMELY, THE OBTAINING OF TRANSPORTATION IN ANY DISTRICT OF THE UNITED STATES AT LESS THAN TARIFF RATES

The indictment charges appellees with receiving a rebate and concession "whereby * * * property was transported * * * through the East-

[2] Whenever in this brief it is stated that the offense "was committed" in the Eastern District of Pennsylvania, or an equivalent statement is made, it is not intended thereby to say that the offense as defined is capable of being "committed" only in a district wherein some part of the transportation may have been conducted. The offense may also be "committed" in the district wherein the shipper receives the rebate, although not a district of transportation, for, while not constituting the substantive offense, the receipt of the rebate is an essential element thereof, and within the meaning of the Sixth Amendment a crime may be said to have been "committed" wherever any of its essential elements are committed. *Hyde* v. *United States*, 225 U. S. 347.

ern District of Pennsylvania and within the jurisdiction of this Court * * * at a less rate and charge than that named and provided in the schedules and tariffs * * *." It sufficiently charges the actual transportation of property in interstate commerce through the Eastern District of Pennsylvania and the receipt by appellees *thereafter* of a rebate and concession "with respect thereto." It is not alleged that prior to or at the time of the physical movement of the property through the Eastern District of Pennsylvania there existed an intent or agreement to receive the rebate and concession, nor is the place where the actual payment of the rebate was effected alleged. From the Government's bill of particulars it appears that a check in payment of the alleged rebates was transferred in the City of New York (R. 27, 28).[3] The question is whether this indictment sufficiently charges the commission of an offense in the Eastern District of Pennsylvania within the meaning of the Sixth Amendment to the Constitution, which guarantees appellees the right to a trial in the "State and district wherein the crime shall have been committed."

---

[3] The bill of particulars (R. 28) recites this fact as having been stated at the bar of the court below by counsel for the Pennsylvania Railroad, defendant in a companion case which was jointly heard with this case in the court below, and which is now before this Court on a similar appeal. *United States* v. *Pennsylvania Railroad Company*, No. 287, October Term, 1938.

The reasoning upon which the court below based its decision answering this question negatively and sustaining the demurrer to the indictment does not appear of record. Its opinion recites merely the bare legal conclusion that "if any violation of the law occurred as alleged, the case should be tried in New York" (R. 30). The demurrer was grounded upon the fact that "it is not stated in the indictment that the rebate was received within the jurisdiction of this court * * * and it further appears * * * that the transportation of the various shipments had terminated more than two years prior to the date of receipt of payment of the alleged rebate" (R. 28, 29).

Apparently the lower court's holding and appellees' contention is that under the allegations of this indictment the crime charged was "committed" at the place where the actual receipt of the rebate occurred, and could not have been "committed" in the Eastern District of Pennsylvania or elsewhere. As we understand the argument of counsel below, it is conceded that a crime is committed and jurisdiction may lie in the district of transportation notwithstanding the place of the payment of the rebate is outside that district, where the payment of the rebate precedes the act of transportation in point of time (*Armour Packing Company* v. *United States*, 209 U. S. 56) or even where the payment of the rebate follows the act of transportation but is pursuant to an understanding or

intent at the time of transportation. *Northern Central Ry. Co.* v. *United States*, 241 Fed. 25, 29 (C. C. A. 2d), certiorari denied, 245 U. S. 645. Apparently it is thought that when the rebate follows the transportation and is not pursuant to an intent or agreement existing at the time of the transportation the offense is committed only at the place where the payment of the rebate is effected, and the plain jurisdictional provisions of the statute are to be disregarded either as in these circumstances inapplicable or as unconstitutional because in violation of the Sixth Amendment.

The error of this argument and of the holding below springs from a failure to recognize the true nature of the offense defined by the Elkins Act and charged by the indictment. The offense so defined and charged does not consist merely of the appellees' act of receiving a rebate (wherever it may have been received in contemplation of law). The offense so charged and defined consists primarily of the accomplishment of a forbidden result, namely, the obtaining of transportation in the Eastern District of Pennsylvania at less than tariff rate. *Armour Packing Company* v. *United States*, *supra*, pp. 74, 75.

This being true, the place of the commission of the offense in the constitutional sense (as will be shown in Part II of this Argument), is the district wherein that forbidden result may have been produced—in this case, the Eastern District of Pennsylvania.

To the extent that the definition of an offense governs the determination of the place where the offense may be said to have been "committed," two types of crimes, as defined by the common law or by statute, are in contrast: first, those which forbid merely the conscious act of the wrong-doer and, second, those which forbid the accomplishment of a specified result. The contrast has been aptly stated by Judge Learned Hand in *Daesche* v. *United States,* 250 Fed. 566, 570 (C. C. A. 2d):

> In short, if the crime, as homicide, be defined to include some consequences of the act, it may be argued and has been generally decided (*U. S.* v. *Davis,* 2 Sumn. 482, Fed. Cas. No. 14932; *U. S.* v. *McGill,* 4 Dall. 426, Fed. Cas. No. 15676) that the crime takes place only where the consequences occur. The crime is the consequence when produced by human agency whether near or far. But where the crime covers only the conscious act of the wrongdoer, regardless of its consequences, the crime takes place only where he acts.

Broadly speaking, of course, it is the purpose of all the prohibitions of the criminal law to forbid results deemed harmful to society, but the limitless variety of human affairs prevents the adoption of any one formula in the attempt to achieve these ultimate results. In some, and perhaps in most instances, the criminal law prescribes merely the conscious human act, without regard to whether or

not that act produces consequences which society fears will ordinarily flow therefrom. In other instances, however, the law forbids primarily the achievement of the consequence itself. In such case, the human act which produced the forbidden consequence may or may not be separately defined as an offense.[4] There are many instances of the type of crime so defined as primarily to forbid a specified result, familiar examples being the offenses of murder and manslaughter, *United States* v. *Davis,* 2 Sumn. 482, Fed. Cas. No. 14932; *United States* v. *McGill,* 4 Dall. 426, Fed. Cas. No. 15676; *Commonwealth* v. *Macloon,* 101 Mass. 1; *Tyler* v. *People,* 8 Mich. 320, and that of obtaining property under false pretenses, *People* v. *Adams,* 3 Denio 190, approved 1 Comstock (N. Y.) 173. Into this class of offenses falls also the offense charged by the indictment herein and defined by the Elkins Act.

A careful consideration of the language of the Elkins Act leaves no doubt but that Congress intended by its enactment to define as an offense against the United States not merely the payment

[4] For some purposes, the distinction between a "human act" and its "consequences" may not be so simply stated. Cf. W. W. Cook, "*Act, Intention and Motive* in Criminal Law," 26 Yale L. J. 645 (1917); Salmond, *Jurisprudence,* 7th ed., Sec. 128 (1924). It is believed, however, that for the purpose here of differentiating between appellees' and the Government's conception of the offense charged by the indictment, as defined by the Elkins Act, the distinction as stated is sufficiently apparent.

or receipt of a rebate in itself, but primarily the achievement of a specified result, namely, that of obtaining transportation in any district of the United States at less than tariff rate. This conclusion is strongly suggested by the significant fact that insofar as the Elkins Act is concerned a shipper's act of receiving a rebate or concession is—in itself and irrespective of consequence—not prohibited.[5]

The Elkins Act encompasses other offenses than the one charged by the indictment in this case. *Armour Packing Company* v. *United States, supra,* page 74. An analysis of the Act discloses that it denounces at least two distinct classes of offenses:

(a) granting, giving, accepting, receiving rebates, concessions, or discriminations, *whereby property shall be transported in interstate commerce at less than tariff rates;*

(b) granting, giving, accepting, receiving rebates, concessions, or discriminations, *whereby any other advantage is given or discrimination is practiced.*

It will be seen that the receipt of a rebate by a shipper is not defined by the Act as a substantive offense in itself, but is denounced only insofar as it may be the means of effecting either of two forbidden results, the obtaining of (1) transportation

[5] It is separately made an offense for a *carrier* willfully to fail "strictly to observe" its published tariffs. (Appendix, *infra*, pp. 32–33.)

in interstate commerce at less than tariff rates, or (2) any other advantage or discrimination.

Although all of the offenses thus classified must be "in respect to the transportation of property in interstate commerce," Congress did not consider this language broad enough for the definition of the offense of the first class (the one charged in the indictment) and added the *"broad and sweeping 'whereby' clause."* *Hocking Valley R. Co.* v. *United States,* 210 Fed. 735 (C. C. A. 6th), certiorari denied 234 U. S. 757. This clause, reading "whereby any such property shall by any device whatever be transported at a less rate than that named in the tariff," is the key to the legislative definition of the offense charged by the indictment in this case. The result by these terms forbidden is the essence of the offense. The terms "rebates, concessions, or discriminations" are merely descriptive of the means by which the forbidden result might be achieved. The legislative denunciation of this forbidden result is further emphasized and effectuated by the inclusion of the phrase "by any device whatever," which significantly modifies not the words "rebates, concessions, or discriminations" but the "whereby" clause itself. This phrase reveals the "objective" purpose of Congress, for by the use of these words Congress freed the prosecution from the requirement of showing moral turpitude or fraudulent intent on the part of

the human actor involved[6] and provided that "any means by which transportation by a concession from the established rate was had is sufficient to work a conviction." *Armour Packing Company* v. *United States, supra,* page 85. Nevertheless, the device is not the offense denounced (*Grand Rapids I. Ry. Co.* v. *United States,* 212 Fed. 577, 582 (C. C. A. 6th)) nor is it even essential that the device be set out in the indictment. *Armour Packing Co.* v. *United States, supra,* pages 83, 84.

Confirmation of the intention of Congress to so define the offense as to make it constitutionally cognizable in any district through which the transportation should be had, irrespective of the place where the rebate or concession might be made, is found in that sentence of the Act which provides: "Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted." In the enactment of this provision it was the purpose of Congress not merely to designate the district in which the offense might be prosecuted, but by that designation to clarify the nature of the offense it had already defined. It cannot be supposed that Congress, in the

[6] As was necessary, prior to the enactment of the Elkins Act, under the Act of March 2, 1889, 25 Stat. 857, Act to Regulate Commerce, Section 10 (now Section 10 of the Interstate Commerce Act). *Armour Packing Company* v. *United States, supra,* page 70.

enactment of this provision, was oblivious to the provisions of the Sixth Amendment. The Act as a whole indicates that it had a further purpose in so providing. That purpose was not merely to designate the district in which the case might be prosecuted, because Congress knew it could not arbitrarily select a district or districts in defiance of the Constitution. It had already, in the charging part of the Act, linked the act of rebating inseparably with the act of transportation. It intended by that portion of the Act, and by the section providing for the place of prosecution, to stamp the offense as primarily forbidding the accomplishment of a forbidden result, namely, the obtaining of transportation, in any district in the United States, at less than lawful rate. The rule is that a statute ought to be so construed that, if possible, no clause, sentence, or word shall be superfluous, void, or insignificant. *Montclair* v. *Ramsdall,* 107 U. S. 147, 152; *D. Ginsberg & Sons* v. *Popkin,* 285 U. S. 204.

That such is the construction to be placed upon such a designation of the place of punishment by Congress is expressly decided in a leading case, decided under the Act to Regulate Commerce, *Davis et al.* v. *United States,* 104 Fed. 136 (C. C. A. 6th). This case was decided on October 2, 1900, only about two years before the consideration and enactment by Congress of the Elkins Act of 1903, and while we find nothing in the legislative history of the Elkins Act in confirmation, it is not unreason-

able to believe that the drafters of the Act, many of whom were attorneys learned in the law of interstate commerce, and that Congress in its enactment, had the opinion of that court in mind.

The *Davis* case involved a prosecution under paragraph 3 of Section 10 of the Act to Regulate Commerce (Act of March 2, 1889; c. 382, 25 Stat. 857) for the fraud therein denounced of obtaining transportation of property at less than "regular rates" by false billing and through similar devices. The statute provided that the prosecution could be had only "within the district in which such offense was committed." No attempt had been made in the Act itself to make the transportation an essential element of the offense. The Circuit Court of Appeals for the Sixth Circuit held that this provision precluded the Government from prosecuting the defendant elsewhere than in the district wherein the fraudulent act or practice may have been committed and was not sufficient to confer jurisdiction in a district wherein merely transportation had been obtained.[7]

Mr. Justice Day, then Circuit Judge, called attention to the fact that the failure of Congress to provide for the punishment in any district through which the transportation passed was significant, and showed that it was not the purpose of Congress to make the transportation an element of the crime.

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[7] This case was distinguished by this Court in reaching an opposite result under the Elkins Act. *Armour Packing Company* v. *United States*, *supra*, page 75.

He said on page 139 of the reported case, referring to the "venue" provision:

> This provision shows the intention of Congress to punish a crime which is committed in a district wherein jurisdiction is given for its punishment.
>
> * * * * *
>
> If it was contemplated that the crime could only be committed when the carriage contracted for was concluded, quite a different provision would have been inserted than the one requiring punishment in the district where committed. Congress in passing this act and providing for the place of trial and punishment in a single district evidently contemplated the consummation of the offense at the place where the goods are billed by the shipper, and the delivery for transportation takes place. It is said this part of the statute providing for the place of trial is nothing more than an enactment of the constitutional provision which requires that in criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury, in the district where the crime was committed. We are unable to see the purpose which Congress could have had in this undertaking to reenact this constitutional provision. Nothing can be added to the force of the statute by repeating a provision which no statute can ignore, and a constitutional requirement with which Congress must be assumed to have been familiar.

Thus that court declared that the fact that Congress omitted to designate any district as a place of punishment other than that where the "offense was committed" was significant of its intention not to characterize the crime as one which might be committed in more than one district. We submit that the express particularity with which Congress has provided for the places of trial in the Elkins Act, later enacted, is equally significant of its purpose to forbid the accomplished result rather than the act of rebating alone and to create jurisdiction in any district where the transportation occurred.

In the case of *Armour Packing Company* v. *United States, supra,* after a careful analysis of the Elkins Act as a whole, this Court concluded (p. 74): "It is at least certain that these sections construed together, make an offense of obtaining transportation at a concession from the published rate, which shall be triable in any district through which it is had."

The Government's interpretation of the Elkins Act is demanded by the cardinal rule of construction, always adhered to by this Court, that a statute will be given a reasonable construction with a view to effecting the objects and purposes of Congress.

II

IN DEFINING THE OFFENSE SO AS PRIMARILY TO FORBID THE ACCOMPLISHMENT OF A RESULT, IT WAS THE INTENTION OF CONGRESS TO MAKE THE OFFENSE CONSTITUTIONALLY COGNIZABLE IN ANY DISTRICT THROUGH WHICH THE TRANSPORTATION MAY HAVE BEEN CONDUCTED. A CONTRARY CONSTRUCTION OF THE ELKINS ACT WILL, BY DEFEATING THIS PURPOSE, MAKE AN EFFECTIVE ENFORCEMENT OF THE STATUTE IMPOSSIBLE

By defining the offense so as primarily to forbid the achievement of a result rather than merely to forbid a human act alone, Congress made the offense constitutionally cognizable in any district through which the transportation may have been conducted. The purpose of Congress in so doing was to make the Elkins Act an effective rather than an impotent weapon against the evil of rebating and discrimination. Congress sought to relieve the prosecution from embarrassment because of uncertainty or lack of knowledge as to the district in which the concession might be granted or in which the rebate might actually be paid. A carrier's books might disclose an unlawful payment but the time and place of actual payment may be unascertainable. And where a negotiable instrument is employed to effect a rebate, the determination of the time and place of the "payment of the rebate" becomes a hazardous undertaking for the prosecutor, even though he may know at what place the

instrument was passed, requiring him to venture into the maze of the law merchant and the uncertain law of the relation between banker and depositor. For the place of the actual passing of a negotiable instrument is not necessarily the place of "payment" or transfer of assets which constitutes the actual "payment of a rebate." This determination often depends upon considerations so vague and difficult of proof as the intention of the parties to the transaction—for example, as to whether it is the intent of the parties that the bank of deposit is the purchaser of the instrument or the collection agent of the depositor. *Burton* v. *United States,* 196 U. S. 283, 301. In the case just cited the Government suffered a reversal of a conviction on jurisdictional grounds because the prosecutor was held to have erred in his judgment as to where "payment" of compensation (by check) to the accused had actually been effected (for services rendered by the accused while a member of the Senate of the United States in relation to a proceeding in which the United States was interested, contrary to statute).

In *Salas* v. *United States,* 234 Fed. 842, 845-847 (C. C. A. 2d), jurisdiction in the Southern District of New York was defeated, where the defendant, in furtherance of an alleged conspiracy to defraud the United States, accepted drafts at Colon in the Republic of Panama payable in the Southern District of New York. The defendant was able to

show that he had forwarded these drafts to banks in Winnipeg, Canada, and Indianapolis, Indiana, and had at these places received credit for them. The court held that the payment of the drafts in the Southern District of New York was not to the accused but to the forwarding banks, the Government having been unable to show an agreement that the forwarding banks were but collection agents of the accused.

Congress, in so defining the offense created by the Elkins Act as to make it constitutionally cognizable in any district through which the transportation may have been conducted, undoubtedly had in mind not only the difficulty and often impossibility of determining in what district the rebate might actually be paid, but also the even more obvious danger of permitting offenders to escape punishment entirely by effecting the payment of the rebate in Mexico or Canada, or on the high seas, or otherwise beyond the jurisdiction of the United States.

The court below having learned that the check in payment of the alleged rebates had been transferred in the City of New York,* concluded (R. 30): "If any violation of the law occurred as alleged, the case should be tried in New York." Had counsel stated that the check had been transferred in the City of Montreal, Canada, the court below, adhering to its interpretation of the law, would have been forced to conclude: "If any violation of

* See Note No. 3, *supra*, p. 9.

the law occurred as alleged, the case is not subject to the jurisdiction of the United States."

Under appellees' construction of the Elkins Act, according to which under the circumstances of this case the offense is "committed" only where the rebate is paid, where would jurisdiction lie in the instance where the carrier's books disclose a proper transportation charge to the shipper, but the offense consists merely in a wilful failure to collect these charges?

Appellees thus urge a construction which would permit the ingenuity of shippers and carriers to defeat completely the beneficial purposes of the Elkins Act, which is a statute so drafted as, in the opinion of Congress, to "*exhaust the power of legislation* to prevent rebates and discriminations through criminal prosecutions."[9]

We submit that appellees' construction of the Elkins Act is untenable and that the statute should be so construed and enforced as to promote its manifest policy and extirpate the evils against which it was directed. Applying this rule of construction and giving effect to all the words and sentences of the statute the only reasonable interpretation of the Elkins Act is that it does not merely forbid the payment of the rebate as an act in itself, but that primarily it forbids the achievement by that means

[9] Report from the Committee on Interstate and Foreign Commerce, Feb. 12, 1903, House Report No. 3765, 57th Congress, 2d Session.

of a specified result, namely, the obtaining of transportation in any district of the United States at less than tariff rate. "Otherwise it might be said that Congress enacted a very salutary law which in many cases could not be enforced." *Perara* v. *United States,* 221 Fed. 213, 317 (C. C. A. 8th). By the construction urged by the Government full effect is given to the obvious intent of Congress to make the offense cognizable in "any district through which the transportation may have been conducted."

III

THE OFFENSE CHARGED BY THE INDICTMENT AND DEFINED BY THE ELKINS ACT WAS COMMITTED WITHIN THE MEANING OF THE SIXTH AMENDMENT IN EVERY DISTRICT THROUGH WHICH THE TRANSPORTATION MAY HAVE BEEN CONDUCTED

For the achievement of the result forbidden by the Elkins Act two events necessarily must occur. There must be (1) actual transportation of property in some district of the United States in interstate commerce, and (2) the grant or acceptance of a rebate from the published tariff rates in respect to such transportation. When these two events have taken place, the forbidden result has been accomplished. The forbidden result has been produced in every district "through which the transportation may have been conducted." "The act concerns itself with preventing concessions and rebates with respect to interstate transportation of

property, and not with carriers, shippers, their agents, or anyone else, unless and until their acts result in the accomplishment of that which the statute forbids." *Spencer Kellogg & Sons* v. *United States,* 20 F. (2d) 459, 461 (C. C. A. 2d); certiorari denied, 275 U. S. 566.

It can make no difference whether the payment of the rebate precedes the actual physical movement of the property or follows it. In both instances the forbidden result is effectively accomplished. In every district through which the transportation may have been conducted transportation at less than tariff rates has been obtained.

The two events whose occurrence is necessary for the achievement of the offense are admitted by the demurrer, which thereby establishes one fact indisputably—*appellees have succeeded in obtaining transportation at less than tariff rates in the Eastern District of Pennsylvania.* The Eastern District of Pennsylvania—since it is a district in which the forbidden result occurred—is the district of the commission of the offense within the meaning of the Sixth Amendment.

Appellees do not see beyond the physical act of a check passing across a desk from one human hand to another, at a particular moment in time and at a particular point in space (beyond the Eastern District of Pennsylvania). At that point, in their view, the crime was "committed"—and to them the verb "commit" creates a wall about that point in space beyond which the eye of the law cannot see.

But the verb "commit," as used in the law of crimes, is a more capable word, and must be so, if criminal jurisprudence is to be applied pragmatically to the infinite variety of human relationships. It is not so restrictive as to encompass only the physical act of the wrongdoer, but encompasses also the consequences of the wrongdoer's act, if the legislature has included the consequences within the definition of the crime. As Mr. Justice Holmes said for this Court in *United States* v. *Holte,* 236 U. S. 140, 155, "'commit' means no more than bring about." It results that in the case of crimes such as the one here involved, which forbid not the human act alone, but primarily the consequences thereof, the offense within the meaning of the Sixth Amendment is "committed" not only in the district where the forbidden act is done but also in the district wherein the forbidden result is produced. It further results that in such cases the physical presence of the offender in the latter district is not essential. The right secured by the Sixth Amendment, this Court said *In re Palliser,* 136 U. S. 257, 265, "is not a right to be tried in the district where the accused resides, or even in the district in which he is personally, at the time of committing the crime, but in the district 'wherein the crime shall have been committed.'" And this Court said again in *Armour Packing Company* v. *United States, supra,* at page 76, that "The constitutional requirement is as to the locality of the offense and not the personal presence of the offender."

Within the past century the increasing com
plexities of modern life have required the relaxa
tion of ancient territorial restrictions on crimina
jurisdiction, and the tendency of the courts ha
been to apply more elastic jurisdictional principle
to modern crime situations.[10] Illustrative of th
trend toward a more realistic approach to th
problem are the "extra-territorial" statute
adopted in many of the States, typical of which
a statute of the State of New York (Baldwin
Cons. Laws of New York (1938), Art. 174, Se
1930 (5)), which provides:

> The following persons are liable to pu
> ishment within the State: * * * A perso
> who, being out of the State and with inte
> to cause within it a result contrary to th
> laws of this State does an act which in i
> natural and usual course results in an a
> or effect contrary to its laws.

An interesting example of an assertion of th
type of jurisdiction is found in the case of *Hanks*
The State, 13 Texas Appeals 289, which upheld
conviction under a Texas statute (Article 4
Texas Penal Code, Act of July 28, 1876, p. 5

[10] Berge, "*Criminal Jurisdiction and the Territorial Pr*
ciple," 30 Michigan Law Review, 239 (1931). Over fi
years ago Francis Wharton wrote: "The great discover
of recent days, by which the obstacles of space are s
mounted, call for a reconsideration of our old conceptions
criminal jurisdiction." Wharton, "*Conflict of Crimi*
Laws," 1 Cr. L. Mag. 689 (1880).

under a chapter head entitled "Forgery of Land Titles, Etc.," and provided:

> Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this chapter which do not in their commission necessarily require a personal presence in this State, the object of this chapter being to arrest and punish all persons offending against its provision, whether within or without this State.

In that case all of the acts constituting the forgery were committed in Louisiana. The court, in its opinion, said:

> We can see no valid reason why the Legislature of the State of Texas could not assert, as it has done in Article 454, *supra,* her jurisdiction over wrongs and crimes with regard to the land titles of the State, no matter whether the perpetrator of the crime was at the time of its consummation, within or without her territorial limits. Such acts are offenses against the State of Texas and her citizens only, and can properly be tried only in her courts. It may in fact be no crime against the State in which it is perpetrated; and if it is, under circumstances as we are considering, that other State would have no interest in punishing it, and would rarely, if ever, do so. *When this forgery was committed in Louisiana, eo instanti a crime was committed against, and injury done to, the State of Texas, because it affected title to*

lands within her sovereignty. [Italics supplied.]

This Court, in *Armour Packing Company* v. *United States, supra,* found that violations of the Elkins Act may constitutionally be tried in the district of transportation, although the physical act of rebating took place in another district. There the rebate preceded the transportation. And appellees concede, as we understand their argument below, that where the rebate follows the transportation a similar conclusion is demanded, provided an intent or agreement with regard to the rebate existed at the time of the transportation. But absence of intent at the time of the physical movement of the property does not alter the fact that when a rebate has thereafter been received with respect to such transportation, the result forbidden by the Elkins Act has been effectively achieved. Intent is important only to the extent that the offender must have knowingly done some act whereby transportation in some district of the United States at less than tariff rate has been obtained. *Armour Packing Company* v. *United States, supra,* page 85. The indictment here sufficiently charges that appellees, by receiving the rebate, knowingly had accomplished this forbidden result—had obtained, in the Eastern District of Pennsylvania, transportation at less than tariff rate. The indictment thus sufficiently alleges the commission of an offense in the Eastern District of Pennsylvania within the meaning of the Elkins Act.

CONCLUSION

It is respectfully submitted that the order of the court below sustaining the demurrer to the joint indictment should be reversed.

ROBERT H. JACKSON,
Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
WENDELL BERGE,
ELMER B. COLLINS,
FRANK COLEMAN,
Special Assistants to the Attorney General.
DWIGHT H. WILLIAMS,
Attorney, Interstate Commerce Commission.

DECEMBER 1938.

APPENDIX

The pertinent provisions of the Elkins Act, Section 1, as amended, c. 3591, sec. 2, 34 Stat. 587 (U. S. C., Title 49, Sec. 41 (1)), read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* Sec. 1. That any thing done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to

said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein. * * *

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 286

THE UNITED STATES OF AMERICA,
Appellant,

vs.

MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

HENRY SILVERMAN,
SAMUEL L. EINHORN,
Counsel for Appellees.

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IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 7380

DECEMBER SESSIONS, 1936.

UNITED STATES OF AMERICA,

vs.

MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN.

STATEMENT OF APPELLEE AGAINST JURISDICTION.

(Filed August 3rd, 1938.)

Pursuant to Rule 12, Paragraph 3, of the Supreme Court of the United States, Midstate Horticultural Company, Inc., and Arpaxat Setrakian submit herewith their statement showing the matters or grounds making against the jurisdiction of the Supreme Court asserted by the United States, appellant in this cause:

1. The statutory provision relied upon by appellant to sustain the jurisdiction of the Supreme Court in this cause is the Criminal Appeals Act of March 2, 1907, Chapter 2564,

34 Stat. 1246, Title 18, Section 682 of the United States Code Annotated, which provides in part as follows:

> "The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases."

The decision in this cause was rendered by the District Court in an opinion filed June 16, 1938, in which opinion the demurrer to the indictment was sustained, as follows:

> "The Court is of the opinion that under all of the facts, jurisdiction is not in this Court, and, so holding, the demurrers are sustained."

2. On June 22, 1938, there was filed the order of the District Court dated June 22, 1938, sustaining the demurrer and discharging the defendant.

3. In its petition for appeal appellant prays for leave to appeal to the Supreme Court of the United States for a reversal of the judgment and order made on June 22, 1938.

4. The appeal in this cause was taken on July 20, 1938 and it appears therefore from the record sought to be reviewed that the appeal was not taken within thirty days after the decision had been rendered by the District Court on June 16, 1938. The mere entry of the order of June 22, 1938, by the District Court sustaining the demurrer, does not extend the time within which the appeal must be taken.

5. The decision of the District Court of June 16, 1938, sustaining the demurrer, is not based on the invalidity or construction of the statute upon which the indictment is founded, as required by the Criminal Appeals Act of March 2, 1907, Chapter 2564, 34 Stat. 1246, Title 18, Section 682 of the United States Code Annotated.

In compliance with Rule 12, Paragraph 3, and Rule 7, paragraph 4 of the Supreme Court of the United States the

appellee includes in this opposing statement the following motion to affirm, which is united in the alternative with the following motion to dismiss:

MOTION TO DISMISS.

The appellee moves the Court to dismiss the appeal filed herein for the following reason:

1. The appeal was not taken within thirty days after the decision had been rendered by the District Court as provided in the Criminal Appeals Act of March 2, 1907, Chapter 2564, 34 Stat. 1246, Title 18, Section 682 of the United States Code Annotated.

MOTION TO AFFIRM.

In the event that the aforesaid motion to dismiss is not granted, the appellee moves the Court to affirm the decision of the District Court sustaining the demurrer to the indictment for the following reason:

1. The decision of the District Court of June 16, 1938, sustaining the demurrer to the indictment, is in accordance with the decisions of the Supreme Court.

Respectfully submitted,

EINHORN & SCHACHTEL,
HENRY SILVERMAN,
(Sgd.) By SAMUEL L. EINHORN,
Attorneys for Midstate Horticultural Company, Inc., and Arpaxat Setrakian, Appellee.

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OCTOBER TERM, 1938.

No. 286.

THE UNITED STATES OF AMERICA,
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MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MEMORANDUM

In re STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

SAMUEL L. EINHORN,
HENRY SILVERMAN,
Counsel for Appellees.

SEPTEMBER 23, 1938.

ALLEN, LANE & SCOTT, PHILADELPHIA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

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The United States of America,
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Midstate Horticultural Company, Inc., and Arpaxat Setrakian.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MEMORANDUM

In re STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The Appellee, The Pennsylvania Railroad Company, in a memorandum filed in this Court on September 20, 1938, in the case of *United States of America* v. *The Pennsylvania Railroad Company,*

(No. 287, present Term) has submitted a supplemental memorandum. As the issues in the two cases are identical, and the facts differ in no pertinent respect, the appellees, Midstate Horticultural Company and Arpaxat Setrakian, believe it is unnecessary to do more in the instant case than to refer to the memorandum hereinbefore referred to, filed on September 20, 1938, with this Court by the Pennsylvania Railroad Company and in which the appellees concur.

Appellees respectfully submit that this Court is without jurisdiction under Section 682 of Title 18 to entertain this direct appeal.

Respectfully submitted,

SAMUEL L. EINHORN,
HENRY SILVERMAN,
Counsel for Appellees.

SEPTEMBER 23, 1938.

FILE COPY

Supreme Court, U. S.
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No. 286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, APPELLANT

v.

MIDSTATE HORTICULTURAL COMPANY, INC., and ARPAXAT SETRAKIAN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF APPELLEES—MIDSTATE HORTICULTURAL COMPANY, INC. AND ARPAXAT SETRAKIAN

HENRY SILVERMAN,
SAMUEL L. EINHORN,
Counsel for Appellees.

HENRY SILVERMAN,
SAMUEL HASSEN,
DAVID SISKIND,
on the Brief.

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v.

MIDSTATE HORTICULTURAL COMPANY, INC., and ARPAXAT SETRAKIAN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN—APPELLEES

Opinion Below

The opinion of the District Court, not yet reported is to be found in the Record (fols. 70-75).[1]

Jurisdiction

Appellees contend that this Court is without jurisdiction to determine the appeal.[2] By order of this Court

[1] Wherever folio references are made—reference is to Transcript of Record.

[2] Jurisdiction is claimed by the Government under Criminal Appeals Act of March 2, 1907 C.2564, 34 St. 1246 (U.S.C.A. Title 18 Sec. 682) and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (U.S.C.A. Title 28, Sec. 345).

dated October 10, 1938 probable jurisdiction was noted upon appellees' motion to dismiss or affirm, the Court however postponing further consideration of these motions to the hearing of the case upon the merits. We again respectfully submit the lack of jurisdiction in this Court, and beg leave to refer to the original Statement Opposing Jurisdiction, the Motions to Dismiss or Affirm and the memorandums of law submitted in support thereof. The Court may of its own motion note the lack of jurisdiction, and it is respectfully submitted that any alleged defect in the motion, as contended by the government, does not affect this Court's right in this respect (Zolines Federal Appellate Jurisdiction and Procedure—3d Ed., pp. 9-10 Sec. 19—Citing Minnesota *v.* Hitchcock, 185 U. S. 373).

Question Presented

The indictment having been found in the Eastern District of Pennsylvania, does it appear that a crime has been charged and "committed" in that district within the language of Article 3 Section 2 Clause 3, and within the language of Amendment VI of the Constitution.*

Statute Involved

The crimes charged in the indictment are defined in Section 41 sub. 1 of Title 49, United States Code Annotated (Appendix, post, p. 29).

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* Constitution Article 3 Section 2 Clause 3
"The trial of all crimes * * * shall be held in the State where the said crimes shall have been committed; * * *."

Constitution Amendment VI
"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. * * *"

Asterisks in citations denote omissions.

Statement

The defendant Midstate Horticultural Company, Inc. is a California corporation engaged in the business of growing, packing and shipping grapes from the State of California to various markets in other States. Its place of business is at Fresno, California. The defendant Arpaxat Setrakian is its Vice President, Secretary and General Manager (fol. 1).

On March 6th, 1937, both defendants were indicted upon 26 counts in the United States District Court for the Eastern District of Pennsylvania for soliciting, accepting and receiving rebates and concessions from the Pennsylvania Railroad Company in respect to transportations of property in interstate commerce, in violation of the Elkin's Act Sec. 41 (1) (U.S.C.A. Title 49). Each count refers to a particular carload of grapes, and except for the differences in weight, car numbers, dates of delivery, persons to whom delivery was made, the amount of freight charges, alleged rebates and the combination of carriers, each count is substantially identical in its phraseology, and substance.

We refer to Count 1 to illustrate the crime alleged. It is there charged that the defendant Midstate Horticultural Company, Inc. was at all times mentioned in the indictment a California corporation; that the defendant Arpaxat Setrakian was its Vice President, Secretary and General Manager; and that the Pennsylvania Railroad Company was a common carrier by railroad for hire (fol. 1)

Throughout the period from October 1, 1932 to December 31, 1932, the Pennsylvania Railroad Company together with other common carriers had filed with the Interstate Commerce Commission a schedule showing the rates and charges over their joint through route. Typical of the

rate, is the allegation that for grapes in lug boxes in minimum carload weights of 26,000 lbs. the charge was to be 173¢ per 100 lbs. (Count 1, fols. 2-3)

On October 15, 1932, various railroads and the Pennsylvania Railroad Company transported from Quality, California, to the Manhattan Produce Yards, in the State of New Jersey, a carload containing 882 lugs of grapes weighing 29,106 lbs. for which transportation the Pennsylvania Railroad Company collected from the defendant Midstate Horticultural Company, Inc. freight charges based on the aforesaid legal rate (fol. 3). *The full legal rate was thus collected.*•

Thereafter, it is charged, *on May 15, 1935 a rebate was solicited, received and accepted* by the defendants from the Pennsylvania Railroad Company on the aforesaid shipments, whereby the said property was transported at less than the legal rate (fol. 7).

The indictment is wholly silent as to what transpired between the period of December, 1932, the month of last delivery, and May 15, 1935, the date of solicitation and receipt of the alleged rebate. The transactions, including the completion of the transportation are not characterized by any criminal taint, but in fact are shown as entirely legal acts.

The sole reference in the indictment with respect to any act or occurrence in the Eastern District of Pennsylvania, is to the effect that during the course of the transportation from Quality, California to the Manhattan Produce Yards in New Jersey, the property passed through that district.

A motion for a bill of particulars was granted. Complying with it *the Government itself* fixed the locus of the

• Italics throughout brief supplied by counsel.

crime and **established that it was not "committed" in the Eastern District of Pennsylvania** but in the Southern District of New York. The bill of particulars filed March 21, 1938 furnished the following answer (fol. 66):

> (1. Question) *Where was the crime committed?*
>
> 1. Answer. It is assumed that defendants desire to know where the check by which payment of all rebates alleged in the 26 counts of the indictment was handed by a representative of the Pennsylvania Railroad Company to a representative of the Midstate Horticultural Company, Inc., and therefore states that the check in payment of all the rebates alleged in said 26 counts of the indictment was given by a representative of the said Railroad Company to A. Setrakian, Vice-President, Secretary, and General Manager of the Midstate Horticultural Company *in the City of New York*, State of New York. All of which was stated at the bar of the Court by Francis Biddle, Esquire, counsel for the Pennsylvania Railroad Company.

The bill of particulars stated that the rebate comprised payments for loss and damage claims of the Midstate Horticultural Company, Inc. paid without carrier liability, as a method of soliciting and receiving rebates (fol. 66).

It is significant to note that the answer to the question "Where was the crime committed?" was made by the government before the demurrer herein was filed.

On April 7th, 1938 the defendants filed their demurrer alleging among other matters that the District Court of Pennsylvania was without jurisdiction, the transportations having terminated more than two years prior to the receipt of the alleged rebate, and the place of receipt of the alleged rebate not having been alleged to have taken place within the jurisdiction of said Court. In essence

the demurrer contended that no crime was shown "committed" within the District of said Court (fols. 67-68). The demurrer was sustained after argument.

The opinion of the Court is illuminating with regard to the concession made by the Government as to the locus of the crime. Its ruling could not be otherwise, by reason of *the conceded fact that the Government itself considered the crime committed in the Southern District of New York* (Bill of Particulars, fol. 66, Opinion fols. 72-73). We here quote the opinion.

> "It is proper to mention that the *full lawful rates* were paid for the transportation of the various shipments, all of which terminated more than two years prior to the date of shipment of the alleged rebate.
>
> In an argument before the Court on the question of where *the crime took place* and the nature of the rebate, the Court ordered that a bill of particulars be filed. In reply thereto, the United States filed a bill of particulars stating • • • 'the check was in effect given by the Pennsylvania Railroad Company to Mr. Setrakian in the *City of New York* • • •.'
>
> • • • • • • •
>
> If any violation of the law *occurred as alleged*, the case should be tried *in New York*. The Court is of the opinion that under all of the facts, jurisdiction is not in this Court, and, so holding, the demurrers are sustained."

Following upon the Court's decision and the entry of an order, the appeal herein was filed by the Government.

ARGUMENT

I

No crime was shown to have been committed within the State or Eastern District of Pennsylvania, and that Court was therefore constitutionally without jurisdiction to try the same.

It is a commonplace of criminal law that an indictment which fails to allege the locus of the crime is demurrable. In the federal courts the allegation is made essential since by the Constitution a defendant can be tried only in the State and district "where the crime shall have been committed." (*Bratton* v. *U. S.*, 73 F. (2) 795, 798 and cases there cited; *Moran* v. *U. S.*, 264 F. 768. Constitution of the United States Article 3, Sec. 2, Clause 3; Amendment 6; *Beavers* v. *Henkel*, 194 U. S. 83.)

No matter how we view the indictment, two facts must be conceded by the Government. The transportations in 1932 through the Eastern District of Pennsylvania were entirely legal and lacked any criminal taint. Secondly, between 1932, when the property passed through the Eastern District of Pennsylvania, and May 15, 1935 the date on which the alleged rebate was paid in New York City, nothing whatever transpired within the jurisdiction where the indictment was found. (See Government's brief, p. 9, and indictment.)

Was a crime "committed" within the Eastern District of Pennsylvania? The determination of the question must rest ultimately upon an interpretation of the Constitutional provisions. The statutes cannot alter their effect, nor detract from the benefits conferred upon the accused. No

matter what statutory provisions may be enacted, no matter what their wording, they cannot change the Constitutional essential—that a crime must be shown to have been committed within the jurisdiction of the Court. The principle is universal. *Ex Parte Slater*, 72 Mo. 102; *State* v. *McGraw*, 87 Mo. 161; *State* v. *Hatch*, 91 Mo. 568; *State* v. *Anderson*, 191 Mo. 134; *State* v. *Dempsey*, 94 Ga. 766; *Dougan* v. *State*, 30 Ark. 41; *State* v. *Lowe*, 21 Va. 782; *Swart* v. *Kimball*, 43 Mich. 443; *Wheeler* v. *State*, 24 Wisc. 52.

The Constitutional provision serves a substantial purpose, and with that in mind, there is adequate reason for the rejection of all efforts to whittle it down to a mere form. "In the power that the newly created national courts might have to move them about to distant places for trial", the people found opportunity for fear. For that reason the Constitutional provisions were enacted (*U. S.* v. *Parker*, 19 F. Supp. 450). The expense and hardship of trial at places remote from the defendants' home furnished ample reason (*U. S.* v. *Parker*, *supra*). In *U. S.* v. *Smith*, 173 Fed. 227, page 232, the Court, refusing an order for removal, upon a failure to show the commission of a crime in the demanding jurisdiction, put the matter clearly.

> "To my mind that man has read the history of our institutions to little purpose who does not look with grave apprehension upon the possibility of the success of a proceeding such as this. If the history of liberty means anything, if constitutional guarantees are worth anything, this proceeding must fail.
>
> If the prosecuting officers have the authority to select the tribunal, if there can be more than one tribunal to select from, if the Government has that power, and can drag citizens from distant states

> to the Capital of the nation there to be tried, then as Judge Cooley says, this is a strange result of a revolution, where one of the grievances complained of was the assertion of the right to send parties abroad for trial."

The Courts have struggled with the definition of the locus of a crime. The Courts, however, have never dispensed with the need to find the crime "committed" within their jurisdiction. They may have found it by some refinement of law, but in every instance it was so found. It was never dispensed with. In *Burton* v. *United States*, 202 U. S. 344, page 389, the Court found substantially that a crime had been committed in the jurisdiction of trial within the meaning of the Constitution.

> "He sent his offer (from another State)* to St. Louis with *the intent* that it should there be accepted and consummated. Having been completed at that City on conformity with the intention of both parties, *an offense was in the eye of the law, committed there.*"

In the case on an act begun in one jurisdiction and ending at the place of trial the Court in *Re Palliser*, 136 U. S. 262, page 267, concluded:

> "But there can be no doubt at all that if an offense was committed in New York, the offense *was continued* to be committed when the letter reached the Postmaster in Connecticut; and that if no offense was committed in New York an offense *was committed* in Connecticut."

In *Moran* v. *U. S.*, 264 F. 768, page 771, the Court reversed a conviction saying:

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*Matter within brackets inserted by counsel.

> "We also think that the second instruction quoted in the earlier part of the opinion is improper, for the reason that jurisdiction was made not to depend upon the performance of any *unlawful act* within the jurisdiction of the Court below either actually or constructively."

Again in determining the locus of the crime in the case of conspiracy, the Courts when the crime of conspiracy was criminal without overt act, permitted the trial to proceed where the conspiracy was formed. When the overt act became an essential of the crime, *the place of commission* was fixed where an overt act took place (*Hyde* v. *U. S.*, 225 U. S. 347; *Shea* v. *U. S.*, 236 Fed. 97, 101; *Brown* v. *Elliot*, 225 U. S. 392). The principle has to this day remained that the prosecution may take place in either jurisdiction.

The doctrine of continuous crime has aided the Court in fixing the locus of an offense intermediate its beginning and end. But always the Court has found a crime *committed* in the jurisdiction of trial (*Brown* v. *Elliot*, 225 U. S. 392; *U. S.* v. *Kissel*, 218 U. S. 601—dealing with *continuing* conspiracies; *McBoyle* v. *U. S.*, 43 F. (2) 273; *Ventimiglia* v. *Aderhold*, 51 Fed. (2) 308—dealing with crime of transporting stolen vehicles, *a crime committed* in every State through which vehicles travel; *Smith* v. *U. S.*, 288 F. 44—dealing with mail theft). A larceny committed in one state can be prosecuted in any other state in which the proceeds are taken, because the taking into another jurisdiction is a new asportation, a continuance of the larceny. Thus again the Court finds the crime committed in the jurisdiction of trial (*Commonwealth* v. *Macloood*, 101 Mass. 1, 5, 6, 100; *People* v. *Burke*, 11 Wend. (N. Y.) 129; *Hemmaker* v. *State*, 12 M

453. See *Ex Parte Slater*, 72 Mo. 102, and cases cited in *Armour Packing Co.* v. *U. S.*, 153 F. 1). In the case of burglary, the proceeds taken into another jurisdiction will confer jurisdiction for larceny but not for burglary, since this crime is not continuing in character (*State* v. *McGraw*, 87 Mo. 161). The contention that every crime is continuous was denied in *U. S.* v. *Lombardo*, 241 U. S. 73, page 78. (See *Armour Packing Co.* v. *U. S.*, 153 F. 1, for a treatment of the various doctrines.)

In every effort of the Court to sustain jurisdiction we submit that it did, in keeping with its conscience, give effect to the explicit command of the requirements of the Constitution. It found crime committed in its presence.

It must be presumed, that it was in the view of these familiar principles and the Constitutional provisions, that Congress enacted the section of the Elkins Act. The section provides:

> "* * * (A)* Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which said violation was committed (B)* or through which transportation may have been conducted, (C)* and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein." (U. S. C. A. Title 49) Sec. 41 (1).

We respectfully submit that Congress in its knowledge of the Constitution and its interpretation, proposed by this Act to provide for jurisdiction in a number of contingencies which might arise in the violation of the Elkins Act.

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*Matter in brackets by counsel.

The part of the section designated as (A) is a mere restatement of the jurisdiction of the courts in any criminal matter.

The part of the section designated (B) represents a situation wherein the arrangement for the rebate is made *prior* to or at the time of the transportation. Under such an arrangement there would be an illegal transportation in each district through which the property is transported. There we would have a situation where the transaction is tainted with criminality from the inception of the transportation, and it necessarily follows that the crime is continued throughout the transportation. It is akin to a contagion which, once begun, contaminates everything it comes in contact with.

That part of the section which we have designated as (C) provides for another situation, wherein a violation is commenced in one place, and ends in another. The offense may be punished in either of the jurisdictions in the same manner as if the offense had been actually and wholly committed therein. It is significant that Congress has seen fit to make three separate provisions in one section. If it was the intention of Congress that regardless of the facts in each case, an offense could be prosecuted in any district through which the transportation was had, no purpose would be served by the other provisions of the venue part of the section.

That this was the intention of Congress, is confirmed by the cases which have construed this provision of the act. In *Armour Packing Co.* v. *U. S.*, 209 U. S. 56, aff. 153 F. 1, the Packing Company delivered goods to the railroad in Kansas City for shipment to other parts. It paid a rate *less than the published through rate* by agreement made prior to shipment, and the shipment was transported to

its place of destination through the Western District of Missouri at the illegal rate. The prosecution of the Packing Company was had in the Western District of Missouri for violation of the Elkins Act (Title 49, Sec. 41(1)).

The Packing Company contended that the crime was complete in Kansas, and could therefore *not be committed thereafter* in Missouri. It contended that the prosecution was therefore violative of the Sixth Amendment. The argument was well taken in view of the law which had construed the Elkins Act prior to amendment. (See *Davis v. U. S.*, 104 Fed. 136.) The Court found it necessary again to establish that a crime was committed within the Western District of Missouri. It did this by applying the doctrine of continuous crime. It found that transportation as it in fact proceeded through each district was illegal and a crime at each instant. In affirming the jurisdiction of the Court it did so in conformity with constitutional demands. It did not dispense with the necessity of finding the crime committed in Missouri, merely because Congress had declared it proper to prosecute where transportation took place. On the contrary, it searched the law to find some doctrine whereby to establish that a crime in Missouri had in fact been committed, for otherwise jurisdiction would have been denied.

> "It is the purpose of the Act to punish those who give or receive transportation, in the sense of actual carriage, at a concession from the published rate. Wherever such transportation is received, there the offense is to be deemed to *have been committed.* * * * In this feature of the statute the transportation being of the essence of the offense, when it takes place, whether in one district or another, whether at the beginning, at the end or in the middle of the journey, it is equally *at all times committed.*" (p. 74)
>
> (*Armour* case, *supra.*)

In enacting the venue section, Congress intended to provide for the case of a *continuing crime.*

> "Congress doubtless had in mind that some of *these offenses* might be complete in a single district; that some might be begun in one and completed in another; and that *those* wherein actual *transportation*—actual carriage was made *an essential element* might *continue* through several districts and hence undertook to provide places for trial of an offense which might be committed against the provisions of the act." (p. 74)
>
> (*Armour* case, *supra.*)

Distinguishing the case of *Davis* v. *U. S.*, 104 Fed. 136. it held that in that case the crime was complete prior to transportation, and did not continue into the district of prosecution. (*Armour* case, *supra,* p. 75.)

The Court in construing the provision conferring jurisdiction where transportation takes place, gave the provision the limited meaning consistent with the Constitution. The Court plainly indicated its application only to a case of continuing crime. Otherwise what need was there for all of the research and reasoning of the Court. Referring to *In re Pallisers,* 136 U. S. 257, it said:

> "In that case the offender had done no act out of New York, and the acts performed by him were complete when the letter was delivered at the post office in that state; but this court held the crime to be *a continuing one.* We think the doctrine for stronger reason applies in the present case, for transportation is an essential element of the offense, and as we have said transportation equally takes place over any and all the travelled route, and during transportation the crime *is being constantly committed.* • • • The charge is of a single con-

tinuous carriage from Kansas City to New York at a concession from the legal rate for the part of the carriage between the Mississippi River and New York at 12 cents for each 100 lbs. so transferred. This is a single continuous, not a series of offenses although it is *continuously committed in each district through which the transportation is received at the prohibited rate.*" (Armour Packing Co. *v.* U. S., 209 U. S. 56, pp. 76-77.)

Mr. Justice Brewer dissented together with Chief Justice Fuller and Mr. Justice Peckham. The dissent of two of the Judges held the crime not continuous but complete at Kansas where the rebate was paid and that the prosecution violated the venue provisions of the Constitution.

The opinion of the Court below in the *Armour* case (153 Fed. 1) is enlightening for its continuous effort to find a *crime committed* within the jurisdiction of the prosecution. In it this Court will find an exposition of the various doctrines whereby the courts have, consistent with their duty, given effect to the Constitutional provisions relating to venue. The law as set out at the beginning of this argument finds ample support in the various citations of the Court. We refer the Court to the entire opinion upon this phase of this case. With regard to the nature of the offense contemplated by the Elkins Act in making the venue depend upon transportation the Court said:

"If the shipper's offense was complete in Kansas it may nevertheless *have continued and have been committed* in the Western District of Missouri also. * * * (p. 5)

* * * * * * *

A continuing offense is a *continuous unlawful* act or series of acts set afoot by a single impulse and

operated by an intermittent force, however long in time it may occupy. Where such an act or series of acts runs through several jurisdictions the offense is complete and cognizable in each. (citing cases) The transportation of the goods in this case into and through the Western District of Missouri at the *alleged illegal through rate* was the continuing operation and effect in that district of its primary cause, *the receipt of the concession and the delivery of the oil by the shipper to the carrier thereunder* for transportation. * * * (pp. 5-6)

* * * * * * *

Counsel invoke the Sixth Article of Amendments of the Constitution and the inviolable rule of the common law that every accused person shall enjoy the right to a trial in the jurisdiction *in which the offense was committed,* and the Court freely concedes and confirms the position that if the offense of the packing company *was not committed* in the Western District of Missouri the Court below was without jurisdiction of this case. * * *. If the offense was not there committed, *then Congress was undoubtedly* without power to make it there judiciable. (p. 6)

* * * * * * *

The last clause of the portion of the act quoted above (the venue provision relating to transportation)* which in addition to the Court in whose district the violation of the Act is committed, confers jurisdiction upon every other court of the United States which has criminal jurisdiction, through whose district transportation is conducted *is unconstitutional and void* if *the offense is not a continuing crime but valid and effective if it is* and that construction which validates and sustains must be preferred * * *." (p. 9)

* * * * * * *

* Matter in brackets counsel's.

"These considerations convince that the Congress intended to make and that by the provision of the act quoted it did make, the offense here charged a continuing crime indictable and punishable in every federal court having jurisdiction of crimes through whose district *the illegal transportation is conducted,* that the offense in this case is of this nature, that if the charge in the indictment is true, this offense continued in the illegal transportation it produced in and through the Western District of Missouri so that *it was there committed.* • • •" (p. 9)

(*Armour* case, 153 Fed. 1, *supra.*)

Further defining the venue section, the Court in *U. S.* v. *Lehigh Valley R. Co.,* 43 F. (2) 135 said:

"Under the Elkin's Act the principal was committing the offense in the district through which the transportation was conducted *at the time when it was conducted.*" (p. 144)

That the search is not for a fictional locus of the commission of crime but for the locus of its actual commission, is illustrated by the case of *New York Central* v. *H. R. R. Co.* v. *U. S.,* 166 Fed. 267, reversing, 153 F. 630. There the Court in defining the provision which permits venue in either the place of commencement or consummation of crime, distinguished between an act lawfully begun and an unlawful act following a completed lawful act. That principle is controlling upon the facts of the instant case, wherein it must be conceded that at least the transportation from beginning to completion was without criminal taint and entirely legal. The case also establishes that the transportation provision of the venue section does not apply to every type of offense defined by Sec. 41 (1) of the Act.

> "This provision applies to a continuing offense—a *continuous unlawful* act or series of acts set in foot by a single impulse and operated by an intermittent force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions the offense is committed and cognizable in each.
>
> • • • • • • •
>
> *"The distinction is between a continuous unlawful act and an unlawful act following a completed lawful act."*
>
> (*N. Y. Central & H. R. R. Co.* v. *U. S. supra.*)

That we are correct in our conclusion that the venue provision of the Elkin's Act requires as a condition of jurisdiction the presence of a continuous crime is emphasized by the holding in the case of *Ventimiglia* v. *Aderhold,* 51 F. (2) 308, wherein the Court in construing a similar provision held:

> "The last clause providing that any person may be punished in any district through which the vehicle has been transported is properly applicable to the offense of transporting a stolen automobile in interstate commerce and is valid because *the offense is actually* committed in any district through which the automobile is being transferred; but this clause cannot apply to the sale of such automobile unless the sale was made in the district where the crime is being prosecuted without rendering such clause unconstitutional to that extent."

The conclusion warranted by a review of these authorities is that a distinction must be made between two cases. The first is where at the inception an unlawful agreement as to rebate is made and an illegal rate paid. The second case is where, at the inception the transactions, including

the completion of transportation are legal, with no criminal intent, but where at some subsequent time, a rebate not contemplated at the inception is procured. In the former case the crime is a continuing one through every jurisdiction of transportation and within the principle of the *Armour* cases *supra* the venue is properly laid in any district of transportation. This is in accord with the constitutional requirement that a crime be tried *where committed*. In the latter case no crime, upon any legal doctrine, can be shown to have been committed prior to the date of rebate. The transportation therefore being then an accomplished legal fact, can furnish no jurisdiction, unless it be the same locality wherein the rebate was paid. The result flows from the fact that no crime can be shown committed in such a case where and when the transportation took place. That is the constitutional test.

These authorities definitely commit the Government to the need of establishing within the meaning of the Constitution that a crime was committed within the Eastern District of Pennsylvania. It cannot seek solace merely in the words of the statute. The latter cannot alter the organic act.

The Government has conceded by the indictment, and the bill of particulars that the first alleged unlawful act was the furnishing of a rebate *at the City of New York* on May 15 1935. It is also conceded that the transportation was complete in December of 1932: that it was then, entirely legal, and that nothing transpired until May 15, 1935 to make it illegal. The sole transaction within the jurisdiction of the Court of the Eastern District of Pennsylvania was an act of transportation in December 1932.

The Law Applied to the Facts of the Case

We see but one way whereby the Government may argue the commission of a crime within the District. It must by a doctrine of relation back, attach the alleged criminal act of rebate conceived on May 15, 1935 in the City of New York to the act of transportation completed in December, 1932 in the Eastern District of Pennsylvania. Unlike the *Armour* cases it must look backward, rather than forward, making a crime operate continuously backward tainting with criminality legal acts preceding it in time. We cannot believe that this Court would accept so artificial a doctrine, in the law of crimes. A court cannot by construction make a crime. (*Merrich* v. *Porter*, 10 Pac. (2) 138; *Bradley* v. *State*, 84 So. 677 (Fla.); *The State* v. *Moore*, 12 N. H. 42.)

> "An act that is not prohibited and made punishable either by the common law or by statute or ordinance *both* at the time of its commission and at the time it is sought to punish therefore cannot be punished as a crime, and the court cannot by construction make that a crime which is not so prohibited." (Corpus Juris, p. 65, §22)

The criminal character of a transaction is to be determined by the conditions existing at that time. (*Norton* v. *U. S.*, 205 Fed. 593, 603; *U. S.* v. *Dietrich*, 126 Fed. 665; *U. S.* v. *Fox*, 95 U. S. 670.) The intent with which an accused does a subsequent act cannot be imputed to him as of a prior date of the crime charged.

> "In coming to your conclusion, you must bear in mind that if one not in solvent circumstances should ask credit or order goods without the present means of paying for them, this by itself is not

fraudulent; nor would it come within the meaning of this section, if one had ordered goods and afterwards devised a purpose of escaping from paying for it."

(*U. S.* v. *Wooten*, 29 Fed. 702.)

The doctrine of relation, or trespass *ab initio* has no application to the criminal law. (*State* v. *Hatch*, 91 Missouri 568; *Milton* v. *State of Florida*, 40 Fla. 250; *Commonwealth* v. *Tobin*, 108 Mass. 426; *The State* v. *Moore*, 12 N. H. 42.)

State v. *Hatch*, 91 Missouri, 568, 570:

"The doctrine of relation does not apply to criminal cases."

Milton v. *State of Florida*, 40 Fla. 251, page 264:

"The Circuit Court must have failed to observe the distinction obtaining in the civil and criminal departments of the law in the application of the rule sought to be invoked in the charge. Mr. Bishop says (Vol. 1 Crim. Law, §208, 8th Edition) 'In civil jurisprudence we have the rule that when a man does a thing by permission of law—not by license, but by permission of law—and after proceeding lawfully part way, abuses the liberty the law had given him, he shall be deemed a trespasser from the beginning by reason of his subsequent abuse. *But this doctrine does not prevail in our Criminal jurisprudence; for no man is punishable criminally for what was not criminal when done, even though he afterwards adds either the act or intent yet not the two together.*' State *v.* Moore, 12 N. H. 42 and Commonwealth *v.* Tobin, 108 Mass. 426, S. C. 11 Am. Rep. 375 sustain the text."

The State v. *Moore*, 12 N. H. 42:

> "The prisoner therefore had the right to enter the inn and the bar room; and the question arises *whether the larceny committed in the bar room relate back and give a character to the entry into the house* so as to make it *criminal* and the prisoner punishable for it upon reasoning similar to which, in a civil action, could render him liable as a trespasser ab initio. Except the inference that may lawfully be made from the act of larceny there is *no evidence that he entered with any illegal purpose or a felonious intent.*" (p. 46)
>
> • • • • • • •
>
> "To hold that for a lawful entry a party could be punished, because after such entry he does an unlawful act, would be to find him guilty of a crime by construction; a result which the law, in its endeavors always to ascertain the real intention of the accused invariably in theory avoids, and which has seldom in modern times happened in practice." (p. 49)

The doctrine of these cases finds peculiar application to the facts at hand. The indictment does not charge an illegal transportation. It concedes it to have been legal, but charges that two and one-half years after the transportation had taken place and the property had come to rest at its destination, and the full legal rate had been paid and the interstate commerce ceased, the defendants, on May 15, 1935 *solicited*, received and accepted a rebate. The charge of a first "unlawful" act is therefore as of May 15, 1935 (see Par. 5 of Count 1, and similar paragraphs in other Counts, fol. 3). Only by the doctrine of relation back, by the imputation of a criminal intent to a lawful transaction in the far past, already complete, can the Government begin to establish a crime committed

within the District. Such a doctrine is contrary to the authorities and has no application in a criminal case.

An effort was made in *N. Y. Central & H. R. R. Co. v. U. S.*, 166 Fed. 267, to justify jurisdiction upon a prior legal act. The Court refused to find jurisdiction, holding it could not be based upon a completed lawful act, followed by an unlawful act.

Conclusion

It is therefore clear that in order for the Court to take jurisdiction in a criminal matter it must be shown that the crime was committed within its jurisdiction. The Government throughout its brief does not dispute this axiom of law. It attempts to construe the Elkins Act so as to convert a completed legal act into an illegal act, and thereby obtain jurisdiction. That is the substance of its argument.

In the case under discussion the facts and the indictment disclose that the transportation was commenced and completed in 1932. The property came to rest in the State of New Jersey at that time, and the carrier's lawful charges were paid. It is conceded by the Government that there was neither an agreement nor an intent prior to or during the shipment of the merchandise to receive a rebate (Appellant's Brief, p. 9). We therefore find that the transportation up to and including the time interstate commerce ceased, was lawful. Some 2½ years thereafter, to wit: May 15, 1935, the appellees are charged in the indictment with having solicited and received a rebate. The bill of particulars discloses that the rebate was paid within the Southern District of New York.

The Government, in order to justify its indictment in the Eastern District of Pennsylvania attempts to link

the appellees' completed legal act of transportation in 1932 with the alleged solicitation and acceptance of a rebate at New York City on May 15, 1935, and thereby obtain jurisdiction. This of course it cannot do. What is it that these appellees did in the Eastern District of Pennsylvania in 1932 that might be construed as criminal or offensive to the Elkins Act? Certainly the conceded lawful transportation of the property through that District in 1932 cannot in any manner be construed to be violative of the Elkins Act. So that it cannot be said that any crime was committed by these appellees in the Eastern District of Pennsylvania in 1932. The only reference in the indictment to the commission of a crime fixes the date as May 15, 1935. It is charged in the indictment and the bill of particulars that on that date the appellees at the City of New York solicited and accepted a rebate in connection with the transportation which took place 2½ years previously. What did these appellees do on May 15th, 1935 at the City of New York which could be constructed to be an offense within the jurisdiction of the Eastern District of Pennsylvania?

It should be noted that the Government in its own bill of particulars established the locus of the crime at the City of New York. This of course was done by the Government before the demurrer herein was filed, and before the burden of proving jurisdiction in the Eastern District of Pennsylvania was cast upon it. If the Government at the time of filing its bill of particulars believed that jurisdiction was in the Eastern District of Pennsylvania, why did it specifically mention the City of New York as the place where the crime was committed?

Assuming, but not conceding that the Government's contention as to jurisdiction is correct, what would be the

effect of the following supposititious cases? Suppose these appellees, after the completion of the lawful transportation of the merchandise, had assigned their claims for property damage against the carrier to a third person. Assume that the third party thereafter filed false claims against the carrier. Would these appellees be subject to indictment under the Elkins Act? If the Government's contention be true, then the rebates paid to the third party would immediately taint the transportation with criminality, and since these appellees began and completed the transportation, they would be indictable, although their actions in the transaction were concededly lawful. Does that not seem absurd? On the other hand, if these appellees are not indictable, is it because they assigned their claims? Can one assign his criminal liability?

Assume further that the assignee had filed false claims in the City of New York, and received rebate there, could he be indicted in any district through which transportation had been conducted? The answer is obvious. It is therefore clear that the two acts mentioned in the indictment are separate and distinct—one, the transportation, which is admittedly legal and complete in itself, and the other, the alleged solicitation and receipt of a rebate, which is also a complete and independent act.

It follows therefore, that at no time can it be said that there was in the Eastern District of Pennsylvania, a continuous crime, and therefore within the law heretofore developed, venue could not be laid in the Eastern District of Pennsylvania. That is the reason why the Court struggled in the *Armour* cases, to find a continuous crime committed under the Elkins Act, by the *continuous illegal transportation*. If all that were necessary were the showing of a mere transportation irrespective of illegality

at the time of occurrence, the Court could well have disposed of the entire case by the mere assertion, that transportation had occurred within the district of trial and that was all that was needed under the Act. But this it did not do. It proceeded to find the transportation continuously illegal—that a crime was being continuously committed in each district of transportation. The only basis for the finding was the existence of an illegal agreement and payment of a rebate pursuant thereto prior to transportation.

We differ with the contention of the Government in its view of where the offense was committed. Conceding for the purpose of the argument that the result of obtaining transportation at an illegal rate is the offense defined by the Elkins Act, we submit that *the result* under the circumstances of this case, occurred, if at all, at the place of payment of the alleged rebate in the Southern District of New York. There it was produced, if produced at all, and did not emanate backwards into any other district. Acting there, the result was produced there. It was not known or felt elsewhere. The solicitation and acceptance of the rebate in New York City was the beginning and ending of the offense. (*New York Central R. R. Co.* v. *U. S.*, 212 U. S. 481; *Standard Oil Co. of Ind.* v. *U. S.*, 164 Fed. 376.)

The fear expressed by the Government (page 23—Brief) of possible evasion of the act by the payment of rebates without the territory of the United States is sufficiently answered by §102—*Offenses on the high seas or* ELSEWHERE (U. S. C. A., Title 28, Judicial Code, Sec. 41; R. S. §730; March 3, 1911 c. 231, §41, 36 Stat. 1100).

The error that the Government has fallen into is that it sought the indictment of these appellees under Title 49,

Section 41, subd. 1. The facts as alleged in the indictment and the bill of particulars indicate that the indictment might have properly been found under Title 49, Section 10, subd. 3, U. S. C. A. That subdivision of Section 10 specifically prohibits the obtaining of transportation at a less than regular rate by the use of false claims. Under that section, however, the Government would have been compelled to indict these appellees within the Southern District of New York. For reasons best known to the Government, it ignored this section which is applicable to the facts alleged in this case, and indicated within the Eastern District of Pennsylvania. Having erroneously initiated this case within that district, it is now attempting, by an arbitrary construction of Section 41 of Title 49, U. S. C. A. to hold jurisdiction of these appellees in that district.

That the entire case of the Government is based on the filing of alleged false claims is conclusively admitted in the bill of particulars (fol. 66) wherein appears the following question and answer:

> (3. Question) Why was it a rebate?
>
> 3. Answer. The Government contends that the Pennsylvania Railroad Company paid the loss and damage claim or claims filed against each carload shipment of Midstate Horticultural Company, Inc. without carrier liability for the alleged loss and damage, and that these claims were filed by the said Midstate Horticultural Company, Inc. and paid by the Pennsylvania Railroad Company as a convenient method of soliciting and granting a rebate or rebates."

It is respectfully submitted that the motion to dismiss for lack of jurisdiction be granted, and in the event that the aforesaid motion to dismiss is not granted, that the order of the court below sustaining the demurrer to the joint indictment should be affirmed.

Respectfully submitted,

HENRY SILVERMAN,
SAMUEL L. EINHORN,
Counsel for Appellees.

HENRY SILVERMAN,
SAMUEL HASSEN,
DAVID SISKIND,
On the Brief.

January, 1939.

Appendix

The pertinent provisions of the Elkins Act, Section 1, as amended, c. 3591, sec. 2, 34 Stat. 587 (U. S. C., Title 49, Sec. 41 (1)), read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, Sec. 1. That any thing done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a

less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein. * * *

CLERK'S OF

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 287

THE UNITED STATES OF AMERICA, APPELLANT

vs.

THE PENNSYLVANIA RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED AUGUST 19, 1938

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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A [Caption omitted.]

B In United States District Court for the Eastern District of Pennsylvania

No. 7382. Dec. Term 1936

THE UNITED STATES

vs.

THE PENNSYLVANIA RAILROAD COMPANY

J. Cullen Ganey, Esq. Barnes, Biddle & Myers, Esqs.

Docket entries

1937

Mar. 6—True bill.

Mar. 17—Appearance of Barnes, Biddle & Myers, Esqs., for defendant filed.

May 27—Motion for bill of particulars filed.

Dec. 7—Argued sur motion for bill of particulars.

Dec. 15—Order of Court granting motion for bill of particulars filed.

1938

Mar. 21—Bill of Particulars filed.

Apr. 9—Demurrer filed.

May 19—Argued sur demurrer.

June 16—Opinion, Welsh, J., sustaining demurrer filed.

July 2—Order of Court sustaining demurrer and discharging defendant filed.

July 20—Petition for appeal to U. S. Supreme Court filed.

July 20—Order of Court allowing appeal filed.

July 20—Assignments of errors filed.

July 20—Citation allowed and issued.

July 20—Praecipe for transcript of record sur appeal filed.

July 20—Statement as to jurisdiction filed.

July 26—Citation returned: "service accepted" and filed.

July 26—Notice to appellee and acknowledgment of service of copies filed.

Aug. 2—Statement of Appellee against jurisdiction, Motion to dismiss appeal and Motion to affirm decision of this Court, filed.

1 In United States District Court

No. 7382. 1936 Session

UNITED STATES OF AMERICA

vs.

THE PENNSYLVANIA RAILROAD COMPANY

Offering, granting, and giving rebates and concessions in respect
the transportation of property in interstate commerce

Indictment

Filed March 6, 1937

The Grand Jurors of the United States of America, empaneled and sworn, in the District Court of the United States for the Eastern District of Pennsylvania, at the — Term thereof, in the year of thousand nine hundred and thirty six, and inquiring for that district upon their oaths and affirmations present:

COUNT 1

1. That at all times mentioned in this indictment The Pennsylvania Railroad Company, hereinafter called defendant, was, and is, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and had general offices at Philadelphia in the Eastern District of said state; that at all times mentioned in this indictment said defendant was a common carrier engaged in the transportation of property in interstate commerce by railroad for hire and, in conjuncion with various other common carriers by railroad for hire more particularly specified in this and in the several

2 remaining counts of this indictment, operated joint through routes, over and by means of their respective connecting railway lines, from certain points in the State of California, to Quality, Fresno, and Conejo in the County of Fresno, through the Eastern District of Pennsylvania, to a certain point on the railroad line of said defendant, to wit: Manhattan Produce Yards in the State of New Jersey; and so said defendant and said various other common carriers, at all times mentioned in this indictment, were subject to the provisions of an Act of Congress approved February 4, 1887 entitled "An Act to Regulate Commerce," and to the Acts of Congress amendatory thereof and supplementary thereto.

2. That at all times mentioned in this indictment Midstate Horticultural Company, Inc., hereinafter called Midstate, was, and is, a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business in Fresno in said state, and was engaged in the shipping of grapes

interstate commerce over the railway lines of common carriers by railroad, including the railway lines and joint through routes of the common carriers aforesaid.

3. That throughout the period from, to wit, October 1, 1932, to, to wit, December 31, 1932, said defendant and said other common carriers more particularly specified in the next succeeding paragraph of this count of this indictment, had printed and had published and had filed with the Interstate Commerce Commission schedules and tariffs of rates and charges which named and showed the joint through rate and charge for the transportation, over their joint through route aforesaid from said Quality through the Eastern District of Pennsylvania to Manhattan Produce Yards aforesaid, of grapes in lug boxes with or without tops, in carload lots subject to a minimum carload weight of, to wit, 26,000 pounds, to be 173 cents for each 100 pounds thereof.

4. That on, to wit, October 15, 1932, Southern Pacific Company, Union Pacific Railroad Company, Terminal Railroad Association of St. Louis, Walter S. Franklin, and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, The Alton Railroad Company, and said defendant, The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 4221; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

4 5. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $282.24, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

5 COUNT 2

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 15, 1932, Southern Pacific Company, Union Pacific Railroad Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, The Alton Railroad Company, and said defendant, The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 27465; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum or, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly
6 offer, grant, and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $302.09, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

7 COUNT 3

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 17, 1932, Southern Pacific Company, Union Pacific Railroad Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, The Alton Railroad Company, The Belt Railway Company of Chicago, and said defendant, The Pennsylvania

Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 15202; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $385.03, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT 4

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 17, 1932, Southern Pacific Company, Union Pacific Railroad Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, The Alton Railroad Company, The Belt Railway Company of Chicago, and said defendant, The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 822 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 807; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight

charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly
10 offer, grant, and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $385.23, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

11 COUNT 5

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 17, 1932, Southern Pacific Company, Union Pacific Railroad Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, the Alton Railroad Company, The Belt Railway Company of Chicago, and said defendant, The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 32514; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to
12 said Midstate, a rebate and concession in the amount of, to wit, $384.23, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common

carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

13

COUNT 6

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 21, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Terminal Railroad Association of St. Louis, and said defendant, The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 900 lugs of grapes of an aggregate weight of, to wit, 26,100 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 19351; that on, to wit, November 2, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $451.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $479.25,

14 in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

15

COUNT 7

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 22, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Union Railway Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C.

Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, Toledo, Peoria & Western Railroad, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Indiana Harbor Belt Railroad Company, and said defendant, The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 38371; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant,
16 The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted and given, to said Midstate, a rebate and concession in the amount of, to wit, $459.90, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

17 COUNT 8

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 23, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Union Railway Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, Toledo, Peoria & Western Railroad, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Indiana Harbor Belt Railroad Company, and said defendant, The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 109; that on, to wit, December 10, 1932, at said Man-

hattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant,
18 The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $402.31, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

19

COUNT 9

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 24, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Union Railway Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, Toledo, Peoria & Western Railroad, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Indiana Harbor Belt Railroad Company, and said defendant, The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 71433; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant,
19 The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted,

and given, to said Midstate, a rebate and concession in the amount of, to wit, $341.78, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania, and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

21 COUNT 10

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 24, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Terminal Railroad Association of St. Louis, and said defendant, The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignee, certain property, to wit, 900 lugs of grapes of an aggregate weight of, to wit, 26,100 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 33483; that on, to wit, November 2, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $451.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit,

22 $325.35, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

23 COUNT 11

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby re-

ferred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 25, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Union Railway Company, Terminal Railroad Association of St. Louis, Walter S. Franklin, and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, Toledo, Peoria & Western Railroad, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Indiana Harbor Belt Railroad Company, and said defendant, The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 15750; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $302.09, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT 12

The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

That on, to wit, October 26, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Union Railway Company, Terminal Railroad Association of St. Louis, Walter S. Franklin, and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, Toledo, Peoria & Western Railroad, Chicago, Milwaukee, St. Paul and Pacific Railroad Company,

Indiana Harbor Belt Railroad Company, and said defendant, The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 35385; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant,
26 The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $321.93, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

27 COUNT 13

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 27, 1932, Southern Pacific Company, Union Pacific Railroad Company, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, and said defendant, The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 900 lugs of grapes of an aggregate weight of, to wit, 26[illegible] pounds, that being a carload lot loaded in and upon a car bearing the initials and number PFE 13763; that on, to wit, December 11, 193[illegible] at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $451.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to
28 said Midstate a rebate and concession in the amount of, to wit, $431.12, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

29

COUNT 14

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 27, 1932, Southern Pacific Company, Union Pacific Railroad Company, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, and said defendant, The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 71674; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to
9 said Midstate a rebate and concession in the amount of, to wit, $350.60, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

31

COUNT 15

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 22, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Terminal Railroad Association of St. Louis, and said defendant, The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 900 lugs of grapes of an aggregate weight of, to wit, 26,100 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 71869; that on, to wit, November 2, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $451.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $387.90, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was

32 transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

33

COUNT 16

1. The facts are set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 28, 1932, Southern Pacific Company, The Denver and Rio Grande Western Railroad Company, Missouri Pacific Railroad Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, Chicago & Illinois Midland Railway Company, Toledo, Peoria & Western Railroad, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Indiana Harbor Belt Railroad Company, and said defendant, The Pennsylvania Railroad Com-

pany, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 35349; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $321.93, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT 17

1. The facts set forth in paragraphs numbered 1, 2, and 3 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 30, 1932, Southern Pacific Company, Union Pacific Railroad Company, Walter S. Franklin and Frank Nicodemus, Jr., as Receivers of Wabash Railway Company, and said defendant, The Pennsylvania Railroad Company, did transport from said Quality over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 882 lugs of grapes of an aggregate weight of, to wit, 29,106 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 23508; that on, to wit, December 10, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $503.53 based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $321.93, in respect to the aforesaid transportation of said shipment of
36 property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

37

COUNT 18

1. The facts set forth in paragraphs numbered 1 and 2 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That throughout the period from, to wit, October 1, 1932, to, to wit, December 31, 1932, said defendant and said other common carriers more particularly specified in the next succeeding paragraph of this count of this indictment, had printed and had published and had filed with the Interstate Commerce Commission schedules and tariffs of rates and charges which named and showed the joint through rate and charge for the transportation, over their joint through route aforesaid from said Fresno through the Eastern District of Pennsylvania to Manhattan Produce Yards aforesaid, of grapes in lug boxes with or without tops, in carload lots subject to a minimum carload weight of, to wit, 260,000 pounds, to be 173 cents for each 100 pounds thereof.

3. That on, to wit, October 3, 1932, Southern Pacific Company, Union Pacific Railroad Company, Chicago Great Western Railroad Company, Indiana Harbor Belt Railroad Company, and said defendant, The Pennsylvania Railroad Company, did transport from said Fresno, over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 930 lugs of grapes of an aggregate weight of, to wit, 26,970 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 32223; that on, to wit, November 1, 1932, at said Manhattan Produce Yards, said
38 defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $466.58, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

4. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did unknowingly offer,

grant, and give, and cause to be offered, granted, and given to said Midstate, a rebate and concession in the amount of, to wit, $474.50, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Fresno, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

39

COUNT 19

1. The facts set forth in paragraphs numbered 1 and 2 of Count 1 and paragraph numbered 2 of Count 18 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 25, 1932, The Atchison, Topeka and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, and said defendant, The Pennsylvania Railroad Company, did transport from said Fresno over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 930 lugs of grapes of an aggregate weight of, to wit, 26,970 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number SFRD 25366; that on, to wit, November 3, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $466.58, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $474.30, in respect to the aforesaid transportation of said shipment of property, by said common carriers, whereby said property was transported from said Fresno, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

COUNT 20

The facts set forth in paragraphs numbered 1 and 2 of Count 1 paragraph numbered 2 of Count 18 of this indictment, which

said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 26, 1932, Southern Pacific Company, Union Pacific Railroad Company, Chicago Great Western Railroad Company, Indiana Harbor Belt Railroad Company, and said defendant, The Pennsylvania Railroad Company, did transport from said Fresno, over their joint through route aforesaid, to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 930 lugs of grapes of an aggregate weight of, to wit, 26,970 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 15848; that on, to wit, November 3, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $466.58, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $474.30, in

42 respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Fresno, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid, at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

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COUNT 21

1. The facts set forth in paragraphs numbered 1 and 2 of Count 1 and paragraph numbered 2 of Count 18 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 26, 1932, Southern Pacific Company, Union Pacific Railroad Company, Chicago Great Western Railroad Company, The Belt Railway Company of Chicago, and said defendant, The Pennsylvania Railroad Company, did transport from said Fresno, over their joint through route aforesaid, to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 930 lugs of grapes of an aggregate weight of, to wit, 26,970 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 33162; that on, to wit, December 9, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the

Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $466.58, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given to said Midstate, a rebate and concession in the amount of, to wit,
44 $453.38, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Fresno, through the Eastern District of Pennsylvania, and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid, at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

45

COUNT 22

1. The facts set forth in paragraphs numbered 1 and 2 of Count 1 and paragraph numbered 2 of Count 18 of this indictment, which said paragraphs are hereby referred to, adopted and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 27, 1932, Southern Pacific Company, Union Pacific Railroad Company, Chicago Great Western Railroad Company, Indiana Harbor Belt Railroad Company, and said defendant, The Pennsylvania Railroad Company, did transport from said Fresno over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 930 lugs of grapes of an aggregate weight of, to wit, 26,970 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 71993; that on, to wit, December 9, 1932, said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $466.58, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1936, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $495.23, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Fresno, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to

Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

47

COUNT 23

1. The facts set forth in paragraphs numbered 1 and 2 of Count 1 and paragraph numbered 2 of Count 18 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 28, 1932, Southern Pacific Company, Union Pacific Railroad Company, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, and said defendant, The Pennsylvania Railroad Company, did transport from said Fresno over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 930 lugs of grapes of an aggregate weight of, to wit, 26,040 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number PFE 38987; that on, to wit, December 11, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $450.49, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $473.38,

48 in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Fresno, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

49

COUNT 24

1. The facts set forth in paragraphs numbered 1 and 2 of Count 1 and paragraph numbered 2 in Count 18 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That on, to wit, October 28, 1932, The Atchinson, Topeka and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, Terminal Railroad Association of St. Louis, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receivers of Wabash Railway Company, and said defendant, The Pennsylvania Railroad Company, did transport from said Fresno over their joint through route aforesaid to said Manhattan Produce Yards, for said Midstate as consignor, certain property, to wit, 930 lugs of grapes of an aggregate weight of, to wit, 26,970 pounds, that being a carload lot, loaded in and upon a car bearing the initials and number "SFRD 26301"; that on, to wit, December 11, 1932, at said Manhattan Produce Yards, said defendant, acting upon instructions given by said Midstate, did deliver said property to the Jerome Distributing Company as consignee of said shipment, and thereafter said defendant did collect from said Midstate for the aforesaid transportation freight charges in the sum of, to wit, $466.58, based and computed upon the aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to said Midstate a rebate and concession in the amount of, to wit, $453.38, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Fresno, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT 25

1. The facts set forth in paragraphs numbered 1 and 2 of Count 1 of this indictment, which said paragraphs are hereby referred to, adopted, and incorporated as fully as if they were herein repeated.

2. That throughout the period from, to wit, October 1, 1932, to, to wit, December 31, 1932, said defendant and said other common carriers more particularly specified in the next succeeding paragraph of this count of this indictment, had printed and had published and had filed with the Interstate Commerce Commission schedules and tariffs of rates and charge for the transportation, over their joint through route aforesaid from said Conejo through the Eastern District of Pennsylvania to Manhattan Produce Yards aforesaid, of grapes in lug boxes with or without tops, in carload lots subject to a minimum carload weight of, to wit, 26,000 pounds, to be 173 cents for each 100 pounds thereof.

3. That on, to wit, October 27, 1932, The Atchison, Topeka and Santa Fe Railway Company, Panhandle and Santa Fe Railway Com-

pany, and said defendant, The Pennsylvania Railroad Company transport from said Conejo over their joint through route aforesa said Manhattan Produce Yards, for said Midstate as consignor, tain property, to wit, 930 lugs of grapes of an aggregate weight o wit, 26,040 pounds, that being a carload lot, loaded in and upon a bearing the initials and number "SFRD 15793"; that on, to wit, vember 6, 1932, at said Manhattan Produce Yards, said defend acting upon instructions given by said Midstate, did deliver said pr

52 erty to the Jerome Distributing Company as consignee of s shipment, and thereafter said defendant did collect from s Midstate for the aforesaid transportation freight charges in sum of, to wit, $450.49, based and computed upon the aforesaid r and charge of 173 cents for each 100 pounds.

4. That thereafter on, to wit, May 15, 1935, said defendant, T Pennsylvania Railroad Company, unlawfully did knowingly of grant, and give, and cause to be offered, granted, and given, to s Midstate, a rebate and concession in the amount of, to wit, $47 in respect to the aforesaid transportation of said shipment of prope by said common carriers, whereby said property was transport from said Conejo, through the Eastern District of Pennsylvania a within the jurisdiction of this Court, to Manhattan Produce Ya aforesaid at a less rate and charge than that named and provided the schedules and tariffs of said common carriers published and fi as aforesaid; contrary to the form of the statute in such case ma and provided and against the peace and dignity of the United Stat

53

COUNT 26

1. The facts set forth in paragraphs numbered 1 and 2 of Count and paragraph numbered 2 of Count 25 of this indictment, which sa paragraphs are hereby referred to, adopted, and incorporated as fu as if they were herein repeated.

2. That on, to wit, October 29, 1932, The Atchison, Topeka a Santa Fe Railway Company, Panhandle and Santa Fe Railway Co pany, Walter S. Franklin and Frank C. Nicodemus, Jr., as Receive of Wabash Railway Company, and said defendant, The Pennsylvan Railroad Company, did transport from said Conejo over their joi through route aforesaid to said Manhattan Produce Yards, for sa Midstate as consignor, certain property, to wit, 930 lugs of grapes o an aggregate weight of, to wit, 26,970 pounds, that being a carlo lot, loaded in and upon a car bearing the initials and number SFR 18559; that on, to wit, December 11, 1932, at said Manhattan Produ Yards, said defendant, acting upon instructions given by said M state, did deliver said property to the Jerome Distributing Compa as consignee of said shipment, and thereafter said defendant d collect from said Midstate for the aforesaid transportation freig charges in the sum of, to wit, $466.58, based and computed upon th aforesaid rate and charge of 173 cents for each 100 pounds.

3. That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given, to
54 said Midstate, a rebate and concession in the amount of, to wit, $453.38, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Conejo, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedule and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(S.) J. CULLEN GANEY,
United States Attorney.

PHILADELPHIA, PA., *March 5, 1937.*

[No. 7382. December Sessions, 1936. United States District Court, Eastern District of Pennsylvania. The United States of America vs. The Pennsylvania Railroad Co. True Bill. H. R. Bassler, Foreman. Indictment: Offering, granting, and giving rebates and concessions in respect of the transportation of property in interstate commerce.]

55 In United States District Court

[Title omitted.]

Motion for bill of particulars

Filed May 27, 1937

And now comes The Pennsylvania Railroad Company, the defendant named in the Indictment filed in the above proceedings, by its attorneys, Messrs. Barnes, Biddle & Myers, and moves the Court for an Order requiring the United States of America to furnish to the said defendant within a time to be therein limited, a written Bill of Particulars of the matters expressed in the Indictment, as follows:

1. Set forth the exact date, time, and place, when and where it is charged that defendant did offer, grant, and give a rebate and concession to Midstate Horticultural Company, Inc., in connection with each shipment of grapes alleged in the Indictment, together with the names of the persons acting on behalf of defendant, and to whom in the Midstate Horticultural Company, Inc., said rebates and concessions were offered, granted, and given, stating specifically whether each of said alleged rebates and concessions were granted and given pursuant to written or oral agreements; if written, set forth exact copies thereof, and, if oral, state the complete substance thereof, together with the time or times when and the place or places

where it is alleged said agreements were made, and the names of the persons acting on behalf of the respective parties.

2. Set forth each and every manner in which defendant did offer, grant, and give to Midstate Horticultural Company, Inc., said
56 rebates and concessions, stating specifically whether said rebates and concessions were offered, granted, and given in connection with a claim or claims for damage to each shipment or shipments filed by Midstate Horticultural Company, Inc., with defendant or any of the other common carriers over whose lines said shipment or shipments were transported.

3. If it is charged that defendant did offer, grant, and give to Midstate Horticultural Company, Inc., said rebates and concessions in any other manner than in connection with a claim for damages to each shipment or shipments filed by Midstate Horticultural Company, Inc., with defendant, or any other common carrier over whose line or lines said shipments were transported, state each and every manner in which the said alleged rebates and concessions were offered, granted, and given by defendant to Midstate Horticultural Company, Inc.

4. It being alleged in the Indictment that defendant did offer, grant, and give twenty-six rebates and concessions to Midstate Horticultural Company, Inc., all on the same date, to wit, May 15, 1935, state whether or not the said rebates and concessions were offered, granted, and given by one payment to Midstate Horticultural Company, Inc., by defendant, and, if by one payment, set forth the manner and place of such payment and the persons paying it on behalf of defendant, and the persons receiving it on behalf of the Midstate Horticultural Company, Inc.

And for such other and further relief as to the Court shall seem meet.

(s.) BARNES, BIDDLE & MYERS.
By ROBERT MASSEY, JR.,
Attorneys for Defendant.

MAY 27, 1937.

57 In United States District Court

[Title omitted.]

Order granting motion for bill of particulars

Filed December 15, 1937

And now, December 15th, 1937, after hearing counsel for plaintiff and defendants and due consideration had, it is

Ordered and decreed that the defendants in each of the above entitled cases be furnished with a Bill of Particulars.

By the Court.

WELSH, *J.*

38 In United States District Court

[Title omitted.]

Bill of particulars

Filed March 21, 1938

Now comes J. Cullen Ganey, United States Attorney, in and for the Eastern District of Pennsylvania, and in compliance with the order of this Honorable Court, dated December 15, 1937, requiring the Government to furnish a bill of particulars with regard to certain matters alleged in the indictment herein, says:

(1. Question.) Where was the crime committed?

1. Answer. It is assumed that defendant desires to know where the check by which payment of all rebates alleged in the twenty-six counts of the indictment was handed by a representative of the Pennsylvania Railroad to a representative of the Midstate Horticultural Company, Inc., and therefore states that the check in payment of all the rebates alleged in the said twenty-six counts of the indictment was given by a representative of the said Railroad Company to A. Setrakian, Vice-President, Secretary and General Manager of
39 the Midstate Horticultural Company in the City of New York State of New York. All of which was stated at the bar of the Court by Francis Biddle, Esquire, counsel for the Pennsylvania Railroad Company.

(2. Question.) How was rebate paid?

2. Answer. Each of the rebates specified in the twenty-six counts of the indictment were included in one check in the amount of $10,526.46, dated May 15, 1935, and drawn by the Treasurer of the Pennsylvania Railroad Company to the order of Midstate Horticultural Company, Inc.

(3. Question.) Why was it a rebate?

3. Answer. The Government contends that the Pennsylvania Railroad Company paid the loss and damage claim or claims filed against each carload shipment of Midstate Horticultural Company, Inc., without carrier liability for the alleged loss and damage, and that these claims were filed by the said Midstate Horticultural Company, Inc., and paid by the Pennsylvania Railroad Company as a convenient method of soliciting and granting a rebate or rebates.

All other matters and questions set forth in defendant's motion for bill of particulars having been abandoned by counsel for the defendant at the bar of the Court, no further answer is being made.

J. CULLEN GANEY,
United States Attorney.

60 In United States District Court

[Title omitted.]

Demurrer

Filed April 9, 1938

And now, to wit, April 9th, 1938, comes The Pennsylvania Railroad Company, the defendant in the above entitled cause, by its attorneys, Messrs. Barnes, Biddle & Myers, and demurs to the indictment returned against it in the above numbered and entitled cause, and for grounds to its demurrer to said indictment says:

1. The said indictment and the matters therein contained in manner and form as the same are therein stated are not sufficient in law, and the defendant is not bound by the law of the land to answer the same. This he is ready to verify.

2. The indictment does not allege any facts which constitute an offense against the laws of the United States.

3. The indictment does not allege any facts which give this court jurisdiction over defendant in this matter; in that it is alleged in

Counts 1 to 26 inclusive of the indictment, that on May 15,

61 1935, defendant did knowingly offer, grant and give, and cause to be offered, granted and given to the Midstate Horticultural Company, Inc., certain rebates in respect to the transportation of certain shipments, but it is not stated in the indictment that the payment of the rebates was made within the jurisdiction of this court, or in what jurisdiction the payment was made, and it further appears in all of the Counts of the indictment that the transportation of the various shipments had terminated more than two years prior to the date of payment of the alleged rebate.

4. The indictment charges the defendant with a payment in connection with granting of twenty-six separate rebates, although the date of payment for each rebate is the same, to wit, May 15, 1935. It is unlawful for the government to split up the single payment into as many parts as there were separate transactions of carriage, and make as many Counts as there are fractional payments thus produced.

Wherefore, for want of sufficient indictment defendant prays judgment on each and every Count of the indictment, and that the same may be quashed.

BARNES, BIDDLE & MYERS.
By (s) ROBERT MASSEY, JR.,
Attorneys for Defendant.

62 In United States District Court for the Eastern District of Pennsylvania

No. 7380. December Sessions, 1936

UNITED STATES OF AMERICA

vs.

MIDSTATE HORTICULTURAL COMPANY, INC., AND ARPAXAT SETRAKIAN

No. 7382. December Sessions, 1936

UNITED STATES OF AMERICA

vs.

THE PENNSYLVANIA RAILROAD COMPANY

Opinion sur demurrers to indictments

Filed June 16, 1938

WELSH, J.: The question is solely one of jurisdiction as to whether or not this is the proper district in which the case should be tried. The Act (49 U. S. C. A., Sec. 41) provides, in part, as follows:

"Every violation of this section shall be prosecuted in any Court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted * * *."

63 In Section 1 of the above referred to Act the crime is defined as follows:

"Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant, or give, or solicit, accept, or receive, any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000."

This is an indictment for rebates alleged to have been given by the Pennsylvania Railroad Company, hereinafter referred to as the Railroad, to Midstate Horticultural Company, Inc., the shipper, hereinafter referred to as Midstate. The Government filed two indictments growing out of these transactions, one against the railroad and one jointly against Midstate and Arpaxat Setrakian. The shipment covered grapes and they were shipped from various points in the West to New York. Thereafter, by reason of damage to the shipment, it became necessary for the grapes to be sold. It is alleged by the railroad that the check subsequently given to Arpaxat Setrakian was an adjustment of this loss incurred by the shippers. It is proper to mention that the full lawful rates were paid for the transportation of the various shipments, all of which terminated more than two years prior to the date of payment of the alleged rebate.

64 In an argument before the Court on the question of where the crime took place and the nature of the rebate, the Court ordered that a bill of particulars be filed. In reply thereto, the United States filed a bill of particulars stating that * * * "the check was in effect given by the Pennsylvania Railroad Company to Mr. Setrakian in the City of New York, New York * * *"

Both sides to this controversy have filed very illuminating briefs and the case argued most ably by counsel. The briefs quite extensively cite leading cases on the subject of rebates and there is, undoubtedly, some conflict of authority between the decisions of the lower courts. This Court, however, is of the opinion that our construction of the case hinges entirely on the question of jurisdiction.

If any violation of the law occurred as alleged, the case should be tried in New York. The Court is of the opinion that under all of the facts jurisdiction is not in this Court, and, so holding, the demurrers are sustained.

65 In United States District Court for the Eastern District of Pennsylvania

No. 7382. December Sessions 1936

UNITED STATES OF AMERICA

vs.

THE PENNSYLVANIA RAILROAD COMPANY

Order sustaining demurrer, etc.

Filed July 2, 1938

And now, to wit, this 23rd day of June, A. D. 1938, it is ordered that the Demurrer to the Indictment in the above entitled cause be, and the same is hereby sustained and defendant discharged without day.

By the Court.

WELSH, *J.*

66 In United States District Court

[Title omitted.]

Petition for appeal

Filed July 20, 1938

United States of America, plaintiff, by its counsel, now comes and says that on June 23, 1938, this court entered its judgment in favor of the defendant against the plaintiff, in which judgment and proceedings had prior thereto in said cause certain errors were committed to the prejudice of the plaintiff, all of which will more fully appear from the assignment of errors herewith filed.

Wherefore United States of America prays that an appeal may issue in its behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in said cause, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

(S.) J. CULLEN GANEY,
United States Attorney.
(S.) EDWARD A. KALLICK,
Asst. U. S. Attorney.

Dated this 20th day of July 1938.

67 In United States District Court

[Title omitted.]

Order allowing appeal

Filed July 20, 1938

United States of America, plaintiff, having by its counsel made and filed its petition praying an appeal to the Supreme Court of the United States from the final judgment of this Court entered June 23, 1938, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided:

It is ordered and adjudged that the appeal be and the same is hereby allowed as prayed and made returnable within forty (40) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which said final judgment was made and entered to the Supreme Court of the United States.

W. H. KIRKPATRICK,
United States District Judge.

Dated this 20 day of July, 1938.

In United States District Court

[Title omitted.]

Assignment of errors

Filed July 20, 1938

United States of America, plaintiff, by its counsel, now comes and, in connection with its petition for an appeal, files the following assignment of errors upon which it will rely in its appeal to the Supreme Court of the United States from the judgment rendered by this Court on June 23, 1938.

The District Court erred:

In sustaining the demurrer to the indictment.

In not overruling the demurrer to the indictment.

3. In holding and adjudging that jurisdiction of the offense charged in the indictment does not lie in the United States District Court for the Eastern District of Pennsylvania.

4. In failing to construe Section 1 of the Elkins Act (49 U. S. C. A. Section 41), the statute upon which the indictment is founded, as fixing jurisdiction of the offenses charged in the indictment in the United States District Court for the Eastern District of Pennsylvania.

5. In holding and adjudging that jurisdiction of the offense charged in the indictment lies solely in the United States District Court for the Southern District of New York.

69 6. In entering the order sustaining the demurrer to the indictment.

J. CULLEN GANEY,
United States Attorney.

Dated this — day of July, 1938.

Service of a copy of the foregoing assignment of errors is hereby acknowledged this — day of July, 1938.

BARNES, BIDDLE & MYERS,
Attorneys for the Pennsylvania Railroad Company, Defendant.

70 [Citation in usual form showing service on Robt. Massey, Jr., filed July 28, 1938, omitted in printing.]

71 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed July 20, 1938

TO THE CLERK OF THE DISTRICT COURT:

Please transmit as the transcript of record in the above entitled case, the following pleadings, documents, and records to the Supreme Court of the United States:

1. Indictment.
2. Motion for bill of particulars.
3. Order granting motion for bill of particulars.
5. Bill of particulars.
6. Demurrer to indictment.
7. Opinion of the court sustaining the demurrer.
8. Order on opinion sustaining the demurrer.
9. Petition for appeal.
10. Assignment of errors.
11. Statement as to jurisdiction.
12. Order allowing appeal.
13. Notice of service on appellee of Petition for Appeal, Order Allowing Appeal, Assignment of Errors, and Statement as to Jurisdiction.

14. Citation on appeal.
15. All docket entries in their proper order.
16. Praecipe for transcript of record.
17. Clerk's certificate.

(S) J. CULLEN GANEY,
United States Attorney.

Service of a copy of the above praecipe is hereby acknowledged this — day of July, 1938.

———— ————,
Attorneys for defendant.

72 [Clerk's certificate to foregoing transcript omitted in printing.]

73 Supreme Court of the United States

Title omitted.

Statement of points and designation of record to be printed

Filed Aug. 23, 1938

I

United States of America, appellant, states that in its brief and ral argument on its appeal in the above-entitled cause it will rely pon the points stated in its assignment of errors therein.

II

The entire record in this cause as filed in this Court is necessary r consideration of the points stated by appellant, and the entire anscript of record as transmitted by the Clerk of the District ourt should be printed by the Clerk of this Court.

ROBERT H. JACKSON,
Solicitor General.

AUGUST 19TH, 1938.

Service of a copy of the above Statement of Points and Designa- n of Record to be Printed acknowledged August 19th, 1938.

BARNES, BIDDLE & MYERS,
JOSEPH ABLE LACY,
Counsel for Appellee.

File endorsement omitted.]

Endorsement on cover:] File No. 42,772. E. Pennsylvania C. U. S. Term No. 287. The United States of America, Appel- vs. The Pennsylvania Railroad Company. Filed August 19, Term No. 287 O. T. 1938.

U. S. GOVERNMENT PRINTING OFFICE 1938

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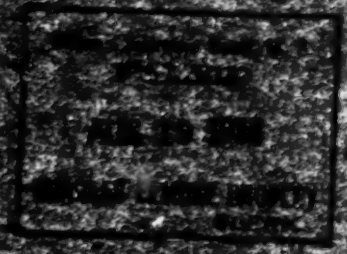

In the Supreme Court of the United States

October Term, 1939

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE PENNSYLVANIA RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Eastern District of Pennsylvania

No. 7382

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT

STATEMENT AS TO JURISDICTION

(Filed July 20th, 1938)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause.

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Title 18, Section 682, of the United States Code, otherwise known as the Criminal Appeals Act, and by Section 345, Title 28, of the United States Code.

B. The statute of the United States, the construction of which is involved herein is the Act of

February 19, 1903, c. 708, 32 Stat. 847 (re-enacted in Section 2 of the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 587); 49 U. S. C. A., Section 41 (1), otherwise known as the Elkins Act, section 1 of which (a) declares it to be a misdemeanor for any person or corporation to offer, grant or give, or to solicit, accept or receive a rebate, concession, or discrimination in respect to the transportation of property in interstate commerce by any common carrier subject to the Act to regulate commerce whereby such property shall by any device whatever be transported at less than the published rate, and (b) provides that

> Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one district and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

C. The judgment of the District Court sought to be reviewed was entered on June 23, 1938, and an application for appeal was presented and allowed on July 20, 1938.

D. The indictment alleges that The Pennsylvania Railroad Company, defendant, as a common car-

rier engaged in interstate commerce by railroad, granted to certain shippers rebates and concessions in respect to interstate shipments of property transported by the defendant through the Eastern District of Pennsylvania and within the jurisdiction of the United States District Court for the Eastern District of Pennsylvania, whereby such property was transported by the defendant at less than the published and filed rate.

A demurrer to the indictment was filed by the defendant and was sustained by the District Court solely on the ground that the offenses charged, if they actually existed, were committed at New York, N. Y., where the defendant's agent handed the check for the amount of the rebates to the shipper, and hence that jurisdiction thereof was in the District Court for the Southern District of New York and not in the District Court for the Eastern District of Pennsylvania.

E. The question involved is substantial. The construction placed by the District Court upon the jurisdictional provision of the Elkins Act is contrary not only to the language of the Act, but also to the practical interpretation of the Act through prosecutions for violations since the date of its enactment. The District Court's construction would seriously interfere with and render far more difficult the future administration and enforcement of the Act.

F. The following decisions are believed to sustain the jurisdiction of the Supreme Court to entertain this appeal.

United States v. *Keitel*, 211 U. S. 370.
United States v. *Nixon*, 235 U. S. 231.
United States v. *Hastings*, 296 U. S. 188.
United States v. *Curtiss-Wright Corp.*, 299 U. S. 304.

A copy of the District Court's opinion filed June 16, 1938, is appended hereto.*

Respectfully submitted.

[s] N. A. TOWNSEND,
N. A. Townsend,
Acting Solicitor General.

[s] J. CULLEN GANEY,
J. Cullen Ganey,
United States Attorney.

[s] EDWARD A. KALLICK,
Assistant U. S. Attorney.

JULY 1938.

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*CLERK'S NOTE.—The opinion is printed as an appendix to the Jurisdictional Statement in No. 276.

U. S. GOVERNMENT PRINTING OFFICE

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 287

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE PENNSYLVANIA RAILROAD COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

In the statement making against jurisdiction in the instant case, the appellee has included a motion to dismiss or affirm which is identical in all respects with that filed by the appellees in *United States of America* v. *Midstate Horticultural Company, Inc., and Arpazat Setrakian* (No. 286, present Term). As the issues in the two cases are identical, and the facts differ in no pertinent respect, the Government feels that it is unnecessary to do more in the instant case than to make reference to its brief in opposition to the motion to dismiss or affirm in the *Mid-*

state Horticultural case, which discusses the [illegible] tentions urged by the appellee herein.

For the reasons stated in the Government's [illegible] in opposition to the motion to dismiss or affirm [illegible] the *Midstate Horticultural* case, we respectfully submit that the motion to dismiss or affirm in the present case should be denied.

ROBERT H. JACKSON,
Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
HUGH B. COX,
ELMER B. COLLINS,
FRANK COLEMAN,
Special Assistants to the Attorney General.

AUGUST 1938.

U. S. GOVERNMENT PRINTING OFFICE

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DEC 29 1938

No. 257

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE PENNSYLVANIA RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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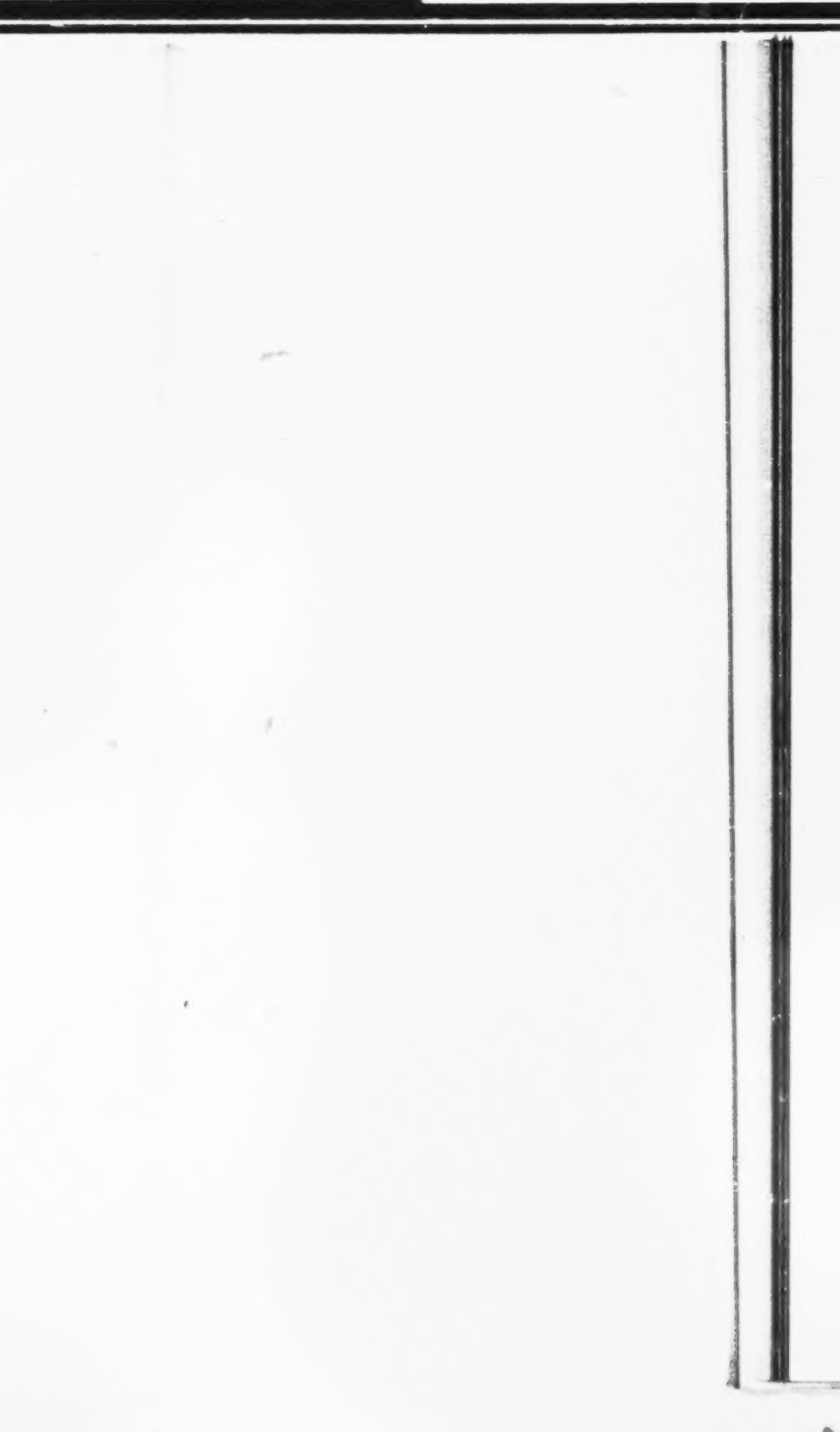

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 287

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE PENNSYLVANIA RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OPINION BELOW

The opinion of the District Court (R. 27, 28) has not yet been reported.

JURISDICTION

The order of the District Court sustaining the demurrer to the joint indictment was entered June 23, 1938 (R. 28). The appeal to this Court was applied for and allowed on July 20, 1938 (R. 29). The jurisdiction of this Court is conferred by the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 345).

An order was entered by this Court on October 10, 1938, noting probable jurisdiction.[1]

QUESTION PRESENTED

The sole question presented on this appeal is whether or not the indictment charges the commission of an offense against the United States in the Eastern District of Pennsylvania, as it must, if appellee is to be prosecuted therein. *Constitution, Article 3, Section 2, Clause 3; Amendment VI.*

STATUTE INVOLVED

The pertinent provisions of the Elkins Act, Section 1, as amended, c. 3591, sec. 2, 34 Stat. 587 (U. S. C., Title 49, Sec. 41 [1]), are printed in the Appendix to the Government's brief in the case of *United States of America, Appellant,* v. *Midstate Horticultural Company, Inc., and Arpaxat Setro-*

[1] The order of October 10, 1938, reads as follows: "In these cases (the order being applicable also to two other cases, Nos. 286 and 295) probable jurisdiction is noted. Further consideration of the motions to dismiss or affirm is postponed to the hearing of the cases on the merits." The appellees' motion to dismiss was based solely upon one of the two grounds included in their statement opposing jurisdiction filed August 3, 1938. Inasmuch as the order of October 10, 1938, noting probable jurisdiction, covers both grounds which appellees urged against jurisdiction and therefore also the sole ground urged in respect to the motion to dismiss, it is assumed that the only matter deferred to the hearing of this case on the merits is the motion to affirm. Since this motion is based upon a single ground going to the merits, separate consideration is deemed unnecessary.

kian, No. 286, which will be argued concurrently with the present case.

STATEMENT

The indictment (R. 2–23) in 26 counts, charges appellee with granting rebates and concessions in violation of Section 1 of the Elkins Act. Each count is identical in substance and, omitting certain details and formal allegations, alleges the following material facts obtaining during the period covered by the indictment:

(1) Appellee, a common carrier, in conjunction with other common carriers by railroad, operated joint through routes for the transportation of property from certain points in California, through the Eastern District of Pennsylvania, to Manhattan Produce Yards in New Jersey.

(2) These common carriers published tariffs naming rates for the transportation of carload shipments of grapes over the above routes, and specifying those rates to be 173 cents per 100 pounds, at a minimum carload weight of 20,000 pounds.

(3) These common carriers on a certain date did transport for Midstate Horticultural Company, Inc., as consignor, a carload shipment of grapes from one of the California points named, over their joint through route as specified, to Manhattan Produce Yards, where the property was delivered to the consignee and the published freight charges col-

lected from the Midstate Horticultural Company, Inc.

The last paragraph of each count is identical in every respect with the exception of the amount of the rebate and the California point of origin of the shipment. The last paragraph of Count 1 (R. 3) is here quoted:

> That thereafter on, to-wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant, and give, and cause to be offered, granted, and given to said Midstate a rebate and concession in the amount of, to-wit, $282.24, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs of said common carriers published and filed as aforesaid; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

The rebates and concessions charged by the several counts of the indictment total $10,391.16.

In a bill of particulars ordered by the court, the Government stated (R. 25):

> (1. Question.) Where was the crime committed?

1. Answer. It is assumed that defendants desire to know where the check by which payment of all rebates alleged in the 26 counts of the indictment was handed by a representative of the Pennsylvania Railroad Company to a representative of the Midstate Horticultural Company, Inc., and therefore states that the check in payment of all the rebates alleged in the said 26 counts of the indictment was given by a representative of the said Railroad Company to A. Setrakian, Vice-President, Secretary, and General Manager of the Midstate Horticultural Company in the City of New York, State of New York. All of which was stated at the bar of the Court by Francis Biddle, Esquire, Counsel for the Pennsylvania Railroad Company.

The defendants demurred to the indictment (R. 26) upon the ground, among others, that (R. 26):

3. The indictment does not allege any facts which give this court jurisdiction over defendant in this matter; in that it is alleged in Counts 1 to 26, inclusive, of the indictment that on May 15, 1935, defendant did knowingly offer, grant, and give, and cause to be offered, granted, and given, to the Midstate Horticultural Company, Inc., certain rebates in respect to the transportation of certain shipments, but it is not stated in the indictment that the payment of the rebate was made within the jurisdiction of this court, or in what jurisdiction the payment was made, and it further appears in all of

> the Counts of the indictment that the transportation of the various shipments had terminated more than two years prior to the date of payment of the alleged rebate.

The District Court sustained the demurrer (R. 28), its opinion (R. 27, 28) concluding:

> If any violation of the law occurred as alleged, the case should be tried in New York. The Court is of the opinion that under all of the facts, jurisdiction is not in this Court * * *.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In sustaining the demurrer to the indictment.

2. In holding and adjudging that jurisdiction of the offenses charged in the indictment does not lie in the District Court of the United States for the Eastern District of Pennsylvania.

3. In failing to construe Section 1 of the Elkins Act, the statute upon which the indictment is founded, as fixing jurisdiction of the offenses charged in the indictment in the District Court of the United States for the Eastern District of Pennsylvania.

4. In holding and adjudging that jurisdiction of the offenses charged in the indictment lies solely in the District Court of the United States for the Southern District of New York.

DISCUSSION

As this case presents the identical question which is involved in the case of *United States of America, Appellant,* v. *Midstate Horticultural Company, Inc., and Arpaxat Setrakian,* No. 286, which will be argued concurrently with the present case, the Court is respectfully referred to the Government's brief in the *Midstate* case for a discussion of the Government's contentions.

CONCLUSION

For the reasons stated in the Government's brief in the *Midstate* case, it is respectfully submitted that the judgment of the court below sustaining the demurrer to the indictment in the instant case should be reversed.

ROBERT H. JACKSON,
Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
WENDELL BERGE,
ELMER B. COLLINS,
FRANK COLEMAN,
Special Assistants to the Attorney General.
DWIGHT H. WILLIAMS,
Attorney, Interstate Commerce Commission.

DECEMBER 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1938

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 287

THE UNITED STATES OF AMERICA,
Appellant,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

CHARLES MYERS,
Counsel for Appellee.

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IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 7382

DECEMBER SESSIONS, 1936.

UNITED STATES OF AMERICA,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

STATEMENT OF APPELLEE AGAINST JURISDICTION.

(Filed August 2, 1938.)

Pursuant to Rule 12, Paragraph 3, of the Supreme Court of the United States, The Pennsylvania Railroad Company submits herewith its statement showing the matters or grounds making against the jurisdiction of the Supreme Court asserted by the United States, appellant in this cause:

1. The statutory provision relied upon by appellant to sustain the jurisdiction of the Supreme Court in this cause is the Criminal Appeals Act of March 2, 1907, Chapter 2564, 34 Stat. 1246, Title 18, Section 682 of the United States Code Annotated, which provides in part as follows:

"The writ of error in all such cases shall be taken within thirty days after the decision or judgment has

been rendered and shall be diligently prosecuted and shall have precedence over all other cases."

The decision in this cause was rendered by the District Court in an opinion filed June 16, 1938, in which opinion the demurrer to the indictment was sustained, as follows:

> "The Court is of the opinion that under all of the facts, jurisdiction is not in this Court, and, so holding, the demurrers are sustained."

2. On July 2, 1938, there was filed the order of the District Court dated June 23, 1938, sustaining the demurrer and discharging the defendant.

3. In its petition for appeal appellant prays for leave to appeal to the Supreme Court of the United States for a reversal of the judgment and order made on June 23, 1938.

4. The appeal in this cause was taken on July 20, 1938, and it appears therefore from the record sought to be reviewed that the appeal was not taken within thirty days after the decision had been rendered by the District Court on June 16, 1938. The mere entry of the order of June 23, 1938, by the District Court, sustaining the demurrer, does not extend the time within which the appeal must be taken.

5. The decision of the District Court of June 16, 1938, sustaining the demurrer, is not based on the invalidity or construction of the statute upon which the indictment is founded, as required by the Criminal Appeals Act of March 2, 1907, Chapter 2564, 34 Stat. 1246, Title 18, Section 682 of the United States Code Annotated.

In compliance with Rule 12, Paragraph 3, and Rule 7, paragraph 4 of the Supreme Court of the United States the appellee includes in this opposing statement the following motion to affirm, which is united in the alternative with the following motion to dismiss.

MOTION TO DISMISS.

The appellee moves the Court to dismiss the appeal filed herein for the following reason:

1. The appeal was not taken within thirty days after the decision had been rendered by the District Court as provided in the Criminal Appeals Act of March 2, 1907, Chapter 2564, 34 Stat. 1246, Title 18, Section 682 of the United States Code Annotated.

MOTION TO AFFIRM.

In the event that the aforesaid motion to dismiss is not granted, the appellee moves the Court to affirm the decision of the District Court sustaining the demurrer to the indictment for the following reason:

1. The decision of the District Court of June 16, 1938, sustaining the demurrer to the indictment, is in accordance with the decisions of the Supreme Court.

Respectfully submitted,

BARNES, BIDDLE & MYERS,
(Sgd.) By CHARLES MYERS,
Attorneys for The Pennsylvania Railroad Company, Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 287.

THE UNITED STATES OF AMERICA,
Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MEMORANDUM

In re STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

CHARLES MYERS,
FRANCIS BIDDLE,
JOHN DICKINSON,
FREDERIC D. McKENNEY,
Counsel for Appellee.

SEPTEMBER 20, 1938.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 287.

The United States of America,

Appellant,

v.

The Pennsylvania Railroad Company.

PPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MEMORANDUM

re STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The fifth numbered point in appellee's "Statement pposing Jurisdiction and Motion to Dismiss or

Affirm" in the above entitled cause has apparently not been fully apprehended by counsel for the United States. See Brief for the United States in Opposition to Appellee's Motion to Dismiss or Affirm, page 12. The point in question is as follows:

> "The decision of the District Court of June 16, 1938, sustaining the demurrer, is not based on the invalidity or construction of the statute upon which the indictment is founded, as required by the Criminal Appeals Act of March 2, 1907, Chapter 2564, 34 Stat. 1246, Title 18, Section 682 of the United States Code Annotated."

Therefore, in order that the significance of the point may not be neglected, and in order that this Court may adequately have the point before it in passing upon the question of jurisdiction, appellee respectfully submits this supplemental memorandum:

The right of the United States to take this appeal *directly* to this Court from the District Court, if such a right exists, must be derived from the second paragraph of Section 682 of Title 18 of the United States Code, which provides that the United States may take such a direct appeal,

> "From a decision or judgment quashing, setting aside or sustaining a demurrer to any indictment for any count thereof where such decision or judgment is based upon the invalidity or construction of *the statute upon which the indictment is founded.*"

In other words, where the decision below went upon a point of statutory construction, which constitutes the issue in the appellate proceeding, the construction must go to the statutory basis of the indictment, *i. e.* to the statute which creates the offense charged, if this Court is to have jurisdiction of a *direct* appeal from the District Court.

In the instant case, the District Court sustained the demurrer by reason of its construction of that part of the so-called Elkins Act (United States Code, Title 49, Section 41) which relates to the venue of proceedings for the prosecution of violations of the Act. Surely an indictment cannot be said to be "founded" on a statutory provision which merely lays the venue of proceedings to enforce the penalty for the offense charged. Such a provision is purely procedural, and does not create the offense or have any reference to the nature and elements of the offense as created by the statute. Obviously the purpose of Section 682 of Title 18 is to make available to the public, by securing the prompt interpretation of this Court, information as to what does and what does not constitute an offense under the statute. That purpose would seem to be self-evident from the use of the phrase "upon which the indictment is founded." All of the decisions in which a direct appeal under the second paragraph of Section 682 have been entertained by this Court have, so far as appellee has been able to discover, been of this character,—*i. e.* cases where the issue is as to what constitutes an offense under the statute and in which it is accordingly necessary to construe the

language of the statute creating the offense in order to determine whether or not the indictment is demurrable.

United States v. *Sutton*, 215 U. S. 291;
United States v. *Heinze*, 218 U. S. 532;
United States v. *Patten*, 226 U. S. 525;
United States v. *Birdsall*, 233 U. S. 223;
United States v. *Foster*, 233 U. S. 515;
United States v. *Nixon*, 235 U. S. 231;
United States v. *New South Farm and Home Company*, 241 U. S. 64.

The only basis for treating the venue provision here in issue as "the statute on which the indictment is founded" is that it occurs within the four corners of the same "act" as the provision creating the offense. Certainly it would not seem to be in accordance with sound construction to interpret the pertinent provision of Section 682 as opening the door to a direct appeal on the construction of any or all provisions which Congress may for one reason or another have seen fit to include within the same legislative enactment which creates the offense. The word statute means something different from "act." By a classic definition, statutes are,

> "those rules of conduct which are introduced by the law-making power in an express and positive form; which control the particular cases and circumstances to which they relate or describe, and which are called statutes, made by legislation."
>
> Dwarris, Statutes (Potter's Edition, 1871), page 38.

In other words, the "statute" is the *rule of conduct*, not the particular combination of written or printed pages which the legislature happened to enact as a single "act." The rule of which the construction will bring a case to this Court by *direct* appeal is the rule "on which the indictment is founded." That rule consists of the statutory provision or provisions creating the offense and does not consist of another and separate procedural rule which lays the venue. It seems obvious that if the venue provision, the construction of which is in issue, were contained in a statute other than the Elkins Act there would be no ground whatever for the contention that such a statute was "the statute on which the indictment is founded." The fact that the venue provision happens to have been included by Congress within the four corners of the Elkins Act should make no difference.

Since the only point of statutory construction involved in this case is the construction of the provision laying the venue, appellee respectfully submits that this Court is without jurisdiction under Section 682 of Title 18 to entertain this direct appeal.

Respectfully submitted,

CHARLES MYERS,
FRANCIS BIDDLE,
JOHN DICKINSON,
FREDERIC D. McKENNEY,

Counsel for Appellee.

SEPTEMBER 20, 1938.

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IN THE

Supreme Court of the United States

October Term, 1938.

No. 287.

THE UNITED STATES OF AMERICA,
Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Appellee.

Brief for the Pennsylvania Railroad Company, Appellee.

Appeal From the District Court of the United States for the Eastern District of Pennsylvania.

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IN THE

Supreme Court of the United States.

No. 287. October Term, 1938.

THE UNITED STATES OF AMERICA,

Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE PENNSYLVANIA RAILROAD COMPANY, APPELLEE.

I. Opinion Below.

The opinion of the District Court (R. 27, 28) has not yet been reported.

II. Jurisdiction.

Appellee in its Statement Opposing Jurisdiction and Motion to Dismiss or Affirm and the Memorandum in support thereof, both of which have been filed in this proceeding, has stated its reasons why this Court has no jurisdiction to entertain this *direct* appeal. In its order of October 10, 1938, this Court noted probable jurisdiction and postponed further consideration of the motion to dismiss the appeal until the hearing on the merits.[1] Appellee renews

[1] The order is: "In this case probable jurisdiction is noted. Further consideration of the motion to dismiss or affirm is postponed to the hearing of the case on the merits."

its motion to dismiss the appeal and incorporates herein by reference the argument it has previously made in its Memorandum.

III. Question Presented.

The sole question presented on this appeal is whether or not the averments in the indictment that the shipments were transported through the Eastern District of Pennsylvania allege a crime there committed, when the indictment discloses that such transportation was at a lawful rate, but does not allege that the rebates were given in such district. *Constitution, Article 3, Section 2, Clause 3; Amendment VI.*

IV. Statute Involved.

The statute involved is Section 1 of the Elkins Act, as amended,[2] the relevant provisions of which are printed in the Appendix to the Government's brief at pages 32-33.

V. Concise Statement of the Case.

Defendant in the present case was indicted in the United States District Court for the Eastern District of Pennsylvania for offering, granting and giving rebates and concessions in respect to the transportation of property in interstate commerce, in violation of the Elkins Act. The indictment (R. 2-23), which was found on March 6, 1937, contains twenty-six counts, each count referring to a particular freight car. In each it is alleged that during October, 1932, the defendant and its connecting carriers transported a shipment of grapes for the Midstate Horticultural Co-

[2] Act of February 19, 1903, c. 708, § 1; 32 Stat. 847, as amended by the Act of June 29, 1906, c. 3591, § 2; 34 Stat. 587; U. S. C., Title 49, § 41 (1).

pany, Inc. as consignor, from California to Manhattan Produce Yards in New Jersey. Each count contains an averment of the weight of the shipment, the number of the car in which it was transported, the date of delivery and to whom delivered, and the payment by the Midstate Company to defendant of the transportation charges provided for in the applicable tariffs. In each count there appears an allegation identical with the following (R. 3), except as to the point of origin of the shipment and the amount of the alleged rebate:

> "That thereafter on, to wit, May 15, 1935, said defendant, The Pennsylvania Railroad Company, unlawfully did knowingly offer, grant and give, and cause to be offered, granted, and given, to said Midstate, a rebate and concession in the amount of, to wit, $282.24, in respect to the aforesaid transportation of said shipment of property by said common carriers, whereby said property was transported from said Quality, through the Eastern District of Pennsylvania and within the jurisdiction of this Court, to Manhattan Produce Yards aforesaid at a less rate and charge than that named and provided in the schedules and tariffs . . ."

On May 27, 1937, defendant filed a Motion for a Bill of Particulars (R. 23) asking that it be informed whether the alleged rebates were paid in connection with a loss and damage claim by the Midstate Company, and where and how the alleged rebates were paid. After hearing argument, the Court granted the Motion (R. 24).

The Government, on March 21, 1938, filed its Bill of Particulars (R. 25), in which was set forth, in answer to the question "Where was the crime committed?" the following:

"1. Answer. It is assumed that defendant desires to know where the check by which payment of all rebates alleged in the twenty-six counts of the indictment was handed by a representative of the Pennsylvania Railroad to a representative of the Midstate Horticultural Company, Inc., and therefore states that the check in payment of all the rebates alleged in the said twenty-six counts of the indictment was given by a representative of the said Railroad Company to A. Setrakian, Vice-President, Secretary and General Manager of the Midstate Horticultural Company in the City of New York, State of New York . . ."

The Bill also stated that the Government contended that defendant paid the loss and damage claims without carrier liability for the alleged loss and damage, from which it is clear that the so-called rebates were paid in settlement of loss and damage claims by the Midstate Company.

On April 9, 1938, defendant filed its demurrer (R. 26) to the indictment. The demurrer was based on lack of jurisdiction in the District Court in that it was not averred in the indictment that the alleged rebates were given within the jurisdiction of the District Court or where the alleged rebates were given. After argument, the Court in an opinion (R. 27) filed June 16, 1938, sustained the demurrer, and on July 2, 1938, a formal order (R. 28) was filed. This appeal (R. 29) followed on July 20, 1938.

VI. Summary of Argument.

An indictment which fails to allege the place of the commission of the offense is demurrable. It is not alleged where the rebates were given. Unless the averments in this indictment, that the several shipments were transported through the Eastern District of Pennsylvania describe a crime there committed, the demurrer should be sustained. A proper construction of the Elkins Act requires that a distinction be drawn between the situation where the transportation *continues* the offense of granting a rebate, and the situation in the present case wherein no rebate was given prior to the transportation and the transportation when conducted through the Eastern District of Pennsylvania was lawful. In the latter situation no crime was in existence when the transportation was conducted and hence no crime could be continued by such transportation. The Act does not purport to confer jurisdiction on a district court in whose district no crime was committed. If, as the Government contends, the Act should be so construed, it violates the Sixth Amendment of the Constitution. The offense defined by the Act is the granting of a rebate. This offense was not committed in the Eastern District of Pennsylvania either by the actual giving of a rebate therein or by unlawful transportation through that district after the rebate was granted. The District Court for the Eastern District of Pennsylvania accordingly has no jurisdiction to try the alleged offense.

VII. Argument.

1. The Demurrer to the Indictment Should be Sustained Because the Indictment Does Not Allege That a Crime Was Committed Within the Eastern District of Pennsylvania.

A. An indictment must allege where the crime was committed.

The indictment does not aver where the alleged rebates were given. Moreover, as appears from the Bill of Particulars, the alleged rebates were given in New York City, and not within the jurisdiction of the District Court. A failure to aver where the crime was committed clearly renders the indictment demurrable.[3] The reason for the requirement that the place of the crime must be alleged is found in the Sixth Amendment of the Constitution which gives to the accused in all criminal prosecutions the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed."[4] An attempt by Congress to confer jurisdiction on a district wherein a lawful act was committed, the crime being elsewhere committed, would be unconstitutional. That the Elkins Act, as we construe it, does not violate the Sixth Amendment will be developed in a later portion of this brief.

Unless, therefore, the averment that the several shipments were transported through the Eastern District of

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[3] *U. S. v. Marx,* 122 Fed. 964; *Patterson v. U. S.* (C. C. A. 6th), 222 Fed. 599, 626, certiorari denied, 238 U. S. 635; *U. S. v. Cristopherson,* 261 Fed. 225.

[4] *Bratton v. U. S.,* 73 F. (2d) 795, 798 (C. C. A. 10th): "When it is recalled that the Sixth Amendment gives the accused a right to a trial in the 'district wherein the crime shall have been committed', a failure to allege that the crime was committed in the district is inexcusable."

Pennsylvania describes a crime there committed, the order of the District Court should be affirmed.

B. The averments in the indictment that the several shipments were transported through the Eastern District of Pennsylvania do not, under the facts and circumstances alleged, describe the commission therein of a violation of the Elkins Act.

It is essential to a consideration of this case that there be clearly borne in mind the distinction between the situation where there is a payment of a rebate *before* the transportation occurs, and the situation in the present case where the transportation was lawfully conducted and some two and a half years *after* its completion an alleged rebate was paid. In the first situation, the offense, namely, the granting of the rebate, is continued by transportation in any jurisdiction through which the transportation is conducted *after* the rebate is granted. There actual transportation is an essential element. In the second situation as in the present case, however, no crime is in existence when the transportation is conducted and hence there can be no continuance of it by the transportation. In that case, actual transportation is not an essential element.[5] Since the trans-

[5] *Armour Packing Co. v. U. S.*, 209 U. S. 56, 74:

"Congress also embraced in § 1 of the Elkins Act offenses not depending upon actual transportation through districts; and as to the trial of such, it also made provisions in the venue section.

"For the penal section is not only aimed at offenses whereby property is transported in interstate commerce at less than published rates, but in terms covers the offering, granting, giving, soliciting, accepting or receiving of rebates, concessions or discriminations, 'whereby any other advantage is given or discrimination is practiced' in respect of interstate transportation.

portation through the Eastern District of Pennsylvania in the present case was lawful when conducted, it cannot be said that a crime was there committed, because of the Sixth Amendment.

The Elkins Act should be construed so as to distinguish between these two dissimilar situations. Such a construction gives effect to every word in the venue clause of the Act. If—and we contend that this has already been decided by this Court—the offense is the granting of a rebate, then it should be prosecuted where it is committed. But Congress had in mind also that the offense once committed could be continued during actual transportation, and to cover such a situation conferred jurisdiction on any district through which the unlawful transportation was conducted. In such a case the granting of a rebate, in effect, taints the transportation with the result that wherever actual transportation is thereafter conducted, the offense of granting a rebate is continuously committed.

This construction of the Act was adopted by this Court, in holding that an indictment will lie in a jurisdiction through which a shipment was transported *under an illegal rate* when the agreement to transport at such rate was consummated in another jurisdiction before the shipment moved. *Armour Packing Co. v. U. S.*, 209 U. S. 56. In that case the Railroad had filed a tariff with an applicable rate of 23 cents per 100 pounds. Thereafter it agreed with the

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"Congress doubtless had in mind that some of these offenses might be complete in a single district; some might be begun in one and completed in another; and those wherein transportation—actual carriage—was made an essential element might continue through several districts, and hence undertook to provide places for trial of any offense which might be committed against the provisions of the act."

Packing Company to transport all its shipments during a stated period for the tariff rate. Before the expiration of the period, the Railroad filed a new tariff providing for a rate of 35 cents per 100 pounds. After this change in the rate the Packing Company delivered a shipment to the Railroad at Kansas City, Kansas, and paid the Railroad 23 cents per 100 pounds in accordance with the agreement. The shipment was transported at the illegal rate through the Western District of Missouri, and the Packing Company was there indicted for violating the Elkins Act.

The Packing Company contended that there was no jurisdiction to prosecute in the Western District of Missouri because the alleged offense was not there committed, but was complete in Kansas City, Kansas, and that if the Elkins Act were construed to permit a prosecution in Missouri, it was unconstitutional under the Sixth Amendment. The Court rejected these contentions (three justices dissenting), affirmed the ruling of the District Court, and upheld its jurisdiction. It ruled that the offense of receiving a rebate in Kansas was continued in each district through which the transportation was received "*at the prohibited rate*" (p. 77 —italics supplied). In the dissenting opinion of Mr. Justice Brewer, joined in by Chief Justice Fuller and Mr. Justice Peckham, the jurisdiction of the Missouri District Court was denied on the ground that the jurisdictional clause of the Elkins Act was unconstitutional because the crime was complete in Kansas and could not be made a continuing offense in each district through which the goods were transported.[6]

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[6] 209 U. S. 56, 89:

"I am authorized to say that the Chief Justice and Mr. Justice Peckham concur in this dissent. They are also of the opinion that the trial court, the District Court of the

A careful study of the majority opinion will show tha the Court based its conclusions squarely on the fact that th Act was intended to make an *illegal* movement the basis o jurisdiction. Thus the Court pointed out (page 73) that i was specifically made an offense in the Act "to receive an rebate or concession *whereby any such property is by an device whatever transported* at a less rate than tha named." (The italics are the Court's.) In other words, th Court emphasized the illegal transportation. Again, pag 74: "For the penal section is not only aimed at offense whereby property is transported in interstate commerce a *less than published rates . . .*" (italics ours). "It is a least certain that these sections, construed together, mak *an offense of obtaining transportation at a concession fro the published rate, which shall be triable in any distri through which it is had.*" (Italics ours.) And on page 7 the Court said: "Under the amended Act, transportation *with a rebate, or at a concession from the established rate* is made an offense as to the shipper as well as the carrier. (Italics ours.) On page 76, the Court pointed out that "dis

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Western District of Missouri, had no jurisdiction of the a leged offense, but that such jurisdiction was vested in th District Court of Kansas, holding that when goods are de livered to the carrier, and the shipper has solicited, accepte or received any rebate, concession or discrimination fro such carrier, 'in respect to the transportation' of the good the crime is then complete, at least so far as regards th shipper, and it cannot be made a continuing crime in eac district through which the goods pass in their transporta tion. The Constitution has made provision for the venu of criminal actions or prosecutions, and their nature cannot be altered by legislative enactment, so as to embrace th whole country in one vast district. A provision in a statut of this nature by which it is possible to find an indictmen and to have a trial at the most remote point from the actua commission of the offense, ought not to be approved as i compliance with the Constitution."

ing transportation the crime is being constantly committed." (Italics ours.) These statements are to be read in the light of the actual decision of the Court.

It is important to note that in the *Armour* case the shipment was actually transported through the Western District of Missouri at an unlawful rate. The Court did not decide that transportation at a *lawful* rate could be made the basis of jurisdiction in a district through which the lawful transportation was conducted.

Judge Sanborn in the Circuit Court of Appeals based his conclusion on the illegal transportation.[7]

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[7] 153 Fed. 1, 5, 6, 9 (C. C. A. 8th):

"The general principle that one who commits a *criminal* act in one county, state, or district may be held liable for its continuous operation in another to which its effect extends, is established by these and many other authorities. . . .

"A continuing offense is a *continuous, unlawful* act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each. . . . The transportation of the goods in this case into and through the Western district of Missouri, at the illegal through rate, was the continuing operation and effect in that district of its primary cause, the receipt of the concession and the delivery of the oil by the shipper to the carrier thereunder for transportation in foreign commerce, and even if the shipper's offense was complete in Kansas, it may have been committed in Missouri also, where its operation continued and took effect. . . .

"Every part of the transportation thus caused is unavoidably violative of this act and illegal, and is necessarily the continuing operation and effect of the unlawful receipt of the concession whereby the carriage is induced. . . . *The transportation of the property in the case in hand from Kansas City to New York into and through the Western district of Missouri at a through rate less than that established under the law was the continuing operation and effect of the receiving of the concession and the delivery of the property thereunder by the shipper.*" (Italics supplied.)

In the present case it appears from the indictment that the shipments moved in October, 1932, and were delivered at the Manhattan Produce Yards in New Jersey in December, 1932. It is not alleged that at those times the shipments were moving under an unlawful rate. On the contrary, the indictment avers that defendant collected from the Midstate Company the "transportation freight charges" provided for in the applicable tariffs, and alleges the giving of rebates "thereafter, on, to wit, May 15, 1935", some two and a half years after the completion of the transportation.[8]

In a later case this Court held (four justices dissenting) that conspirators could be prosecuted in a district in which an overt act was committed though the conspiracy was formed in another jurisdiction. *Hyde v. U. S.*, 225 U. S. 347. The Court referred to the decision in the *Armour* case that "the transportation of merchandise for less than the published rate is, under the Elkins Act, a continuing offense" (p. 364), and concluded that the conspiracy was continued where the overt act was committed. *It will be observed that the Court is again stressing the continuing nature of an offense already committed.* Mr. Justice Holmes, with whom concurred Mr. Justice Hughes, Mr. Justice Lurton and Mr. Justice Lamar, dissented on the ground that the lower court had no jurisdiction, saying, p. 388:

> "The overt act is simply evidence that the conspiracy has passed beyond words and is on foot when the act is done. As a test of actuality it is made a condition to punishment, but it is no more a part of the crime than it was at common law, where it was customary to allege such an act; or than is the fact that the statute of limitations has not run.
>
> "I can think of no other case in which it would be argued that an act constituting no part of the crime

[8] Pages 4, 9 of the Government's brief.

charged draws jurisdiction to the place where it is done."

In *New York Central Railroad Co. v. U. S.*, 166 Fed. 267 (C. C. A. 2d), the carrier was indicted in the Western District of New York for wilfully failing to file schedules of rates with the Interstate Commerce Commission. The court decided that the offense was committed in Washington, D. C., and that it was not a continuous offense running into different districts. In discussing the fact that the schedule was prepared in New York, the court said at page 270:

> "The preparation of the schedule is an entirely lawful act, and wholly distinct from the duty or omission of duty to file it. The work of preparation is ended before the duty to file begins. The case is not at all analogous to the offense of presenting a false claim in one district which was prepared in another. There the unlawful preparation might well be considered an essential part of the unlawful presentation, and the commission of the offense as having been commenced where the preparation took place. *The distinction is between a continuous unlawful act and an unlawful act following a completed lawful act.*" (Italics supplied.)

Another case which illustrates that an offense cannot be continued until after the commission of a criminal act is *Conley v. U. S.*, 23 F. (2d) 226 (C. C. A. 4th). There the defendant was indicted in North Carolina for violating § 151 of the Penal Code (U. S. C., Title 18, § 265) which made it an offense to conceal with intent to defraud any forged or altered obligation of the United States. The defendant had stolen unaltered Liberty Bonds in North Carolina and at the time of his apprehension in Michigan the bonds were altered. Defendant appealed from the conviction, assigning as error, *inter alia*, that the District Court had refused to

charge the jury that if not satisfied that defendant did not have the bonds in North Carolina after they had been altered or that he altered them in North Carolina, they should find him not guilty. The Government contended that the venue was properly laid in North Carolina under the Statute (U. S. C., Title 28, § 103), which provided that where an offense is begun in one district and completed in another it may be dealt with in either. In reversing, the Court said (p. 228):

> "And while the intention may have been formed at that time to afterward make the alteration, yet we are of the opinion that, even if such an intention could be properly concluded from the evidence in the case, it did not constitute such a beginning as is contemplated by section 1024, Comp. Stat. Ann. . . .
>
> "The offense of having in possession the bonds in question with intent to defraud, might consist of distinct parts having different localities, and might constitute a continuously moving act, yet it is clear that this offense could not have begun until after the bonds had been altered."

It is submitted that the transportation through the Eastern District of Pennsylvania almost two and a half years before the payment of the alleged rebates will no more support the jurisdiction of the District Court in the present case than the offense of possessing bonds in North Carolina with intent to defraud before they had been altered could furnish a basis for the jurisdiction of the North Carolina District Court in the *Conley* case. The similarity between the *Conley* case and the present one is emphasized by comparing both cases with the one which is referred to in the Government's brief.[9]

[9] Pages 28-29 of the Government's brief.

A consideration of the first portion of the venue clause of the Elkins Act which confers jurisdiction where the violation of the Act is committed requires a discussion of the nature of the offense prescribed in the statute. The Government contends that the offense consists primarily of the accomplishment of a forbidden result, namely, the obtaining of transportation in the Eastern District of Pennsylvania at less than tariff rate.[10] From this it argues that the place of the commission of the offense in the constitutional sense is the Eastern District of Pennsylvania. It is interesting to note the conclusion to which this argument leads. If the offense, by definition in the charging part of the act, is committed wherever the forbidden result is accomplished, then Congress could have provided for all contingencies in the venue section by conferring jurisdiction on the court in whose district the violation of the act was committed. It would have been wholly unnecessary to refer to the districts through which the transportation may have been conducted. This construction, however, does not give effect to every clause, sentence and word of the act.[11]

An analysis of the Government's interpretation of the Act reveals a fatal error in logic. The conclusion is inserted as part of the premise. The reasoning is somewhat as follows: the offense consists primarily of the accomplishment of a forbidden result—the obtaining of transportation in the Eastern District of Pennsylvania at less than tariff rate; since this result was produced in the Eastern District of Pennsylvania, that is the district wherein the offense was committed. This reasoning, however, assumes that the forbidden result was accomplished before the cause, the grant-

[10] Page 11 of the Government's brief.
[11] Page 17 of the Government's brief.

ing of the rebate, occurred. It cannot be said that the transportation through the Eastern District of Pennsylvania was the result of the granting of a rebate almost two and a half years after the transportation was concluded. Although the Government does not categorically assert that the granting of a rebate relates back to the lawful transportation so as to make it unlawful and thereby make it a crime at the time it was conducted, it reaches the same conclusion by its reasoning. We contend that this result was never intended by Congress, and that this Court in the *Armour* case has already construed the Act so as to preclude such a result. A statement that the offense of granting a rebate may be continued by subsequent transportation, it is submitted, excludes the proposition that such offense can relate back to lawful transportation conducted prior to the granting of the rebate.

The Government characterizes the Act as one designed to prevent the accomplishment of a specified result, rather than the conscious act of the wrong-doer. It is said that the law forbids the achievement of the consequence itself.[12] It may be inquired, the consequence of what. There must be some conscious act prescribed by a statute before any consequence can be said to flow from it. The only conscious act prescribed in this statute is the granting of a rebate. Until this act is committed, no consequences can result from it. It is not helpful to say that as a consequence of the rebate, transportation was furnished at less than the tariff rate. In this sense, transportation is an essential element of the alleged offense. But the relevant inquiry is, was the transportation unlawful when conducted so that at that time a crime was committed in the Eastern District of Pennsylvania.

[12] Page 13 of the Government's brief.

This question cannot be affirmatively answered unless the act of granting a rebate can be "continued backward" to the lawful transportation and unless it is concluded that a precedent occurrence can be the consequence of a subsequent act. Such a conclusion is contrary to reason and to the plain provisions of the statute.

The Government attempts to support its construction of the Elkins Act by coupling the Act with the opinion in *Davis et al. v. U. S.*, 104 Fed. 136 (C. C. A. 6th).[13] A careful analysis of the *Davis* case discloses that the Court concluded that transportation was not an essential element in the offense prescribed by Section 10 of the Interstate Commerce Act,[14] because no jurisdiction was conferred on any district court other than the one in which the violation was committed. If Congress had intended transportation to constitute a part of the crime, the court apparently reasoned, it would have provided for the prosecution of the offense in districts through which the transportation was conducted. It will be noted, however, that the Court stated that Congress could have made the offense a *continuing* one by making certain additional provisions in the Act.[15] This, it is submitted, is precisely what Congress intended to and did do by adding in the Elkins Act that prosecutions should be instituted in any district through which the transportation may have been conducted. It is not unreasonable to believe that the drafters of the Elkins Act had in mind the *entire* opinion in the *Davis* case, including the portion above

[13] Pages 18-19 of the Government's brief.

[14] Act of February 4, 1887, c. 104, Section 10 (3), 24 Stat. 382, as amended, U. S. C., Title 49, Section 10 (3).

[15] 104 Fed. 136, 141: "If the carriage of the goods was the thing aimed at in this statute, and such was to have been deemed fraudulent per se, the crime might be regarded as a continuing one." (Italics supplied.)

quoted.[16] That this is also what this Court believed Congress had done is forcefully shown in the *Armour* case, in which the opinion was written by Mr. Justice Day, who as Circuit Judge wrote the opinion in the *Davis* case.

It is instructive to analyze the analogy the Government draws between the Elkins Act and homicide statutes.[17] Let us suppose that A standing in X shoots a gun and the bullet kills B standing in Y. The offense of killing B was cognizable at common law only in Y. By statute the offense may be made punishable in X or Y. The theory on which is rested the power of X to punish the offender is that the act of shooting the gun *caused* a criminal result in Y.[18] It therefore appears that two elements must exist in order to permit a prosecution in X: (1) the act of shooting must by statute be made punishable in X, and (2) must have *caused* a crime. We contend that the act of lawful transportation is not made punishable anywhere by the Elkins Act. If the Act purported to make the lawful transportation a crime, the requirement that the lawful act must cause the criminal result would be disregarded. That such an attempt by Congress would be unconstitutional is indicated by the Circuit Court of Appeals in the *Armour* case.[19]

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[16] Page 18 of the Government's brief.

[17] Page 13 of the Government's brief.

[18] American Law Institute Restatement, Conflict of Laws, § 428.

[19] 153 Fed. 1, 19:

"The last clause of the portion of the act quoted above, which, in addition to the court in whose district the violation of the act is committed, confers jurisdiction upon every other court of the United States, which has criminal jurisdiction, through whose district the transportation is conducted, is unconstitutional and void if the offense is not a continuing crime, but valid and effective if it is, and that

In addition to conferring jurisdiction on districts herein the Act is violated and through which *unlawful* transportation is conducted, Congress has, in the Elkins Act, provided also that where the offense, namely, the granting of a rebate, is begun in one jurisdiction and completed in another, it may be prosecuted in either jurisdiction. This last provision, it is submitted, conclusively dissipates the difficulties, suggested by the Government, in ascertaining the place of payment of a rebate.[20] If any part of the offense of granting a rebate—and this would include the delivery of a check—occurred in a district, the offense could under this provision, be prosecuted in that district.

In this connection the Government has rhetorically inquired where jurisdiction would lie where a carrier made a proper transportation charge on its books but wilfully failed to collect it.[21] The obvious answer is that the rebate was granted and the offense committed at the place where the carrier failed to collect the charge. This would normally be the place of final delivery of the shipment,[22] but the offense might be committed in other places depending on the circumstances of the particular case.

The possibility is suggested by the Government [23] that payment of a rebate might be made beyond the jurisdiction of the United States and the Act thereby evaded. It must be remembered, although it is not applicable in this case

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onstruction which validates and sustains must be preferred to that which strikes down and paralyzes so plain a provision of a statute."

[20] Pages 21-23 of the Government's brief.

[21] Page 24 of the Government's brief.

[22] See *Hocking Valley R. Co. v. U. S.*, 210 Fed. 735 (C. A. 6th), certiorari denied 234 U. S. 757, where a similar situation was apparently involved.

[23] Page 23 of the Government's brief.

because it is alleged that rebates were actually given, that the Act forbids the offering or solicitation of a rebate as well as the giving or receiving of it. As a practical matter it would be virtually impossible for two or more persons to be simultaneously at the same place outside their country for the purpose of giving and receiving a rebate either without prior conduct in this country which would amount to offering or soliciting a rebate, or subsequent transportation in this country which would be tainted by the illegal agreement or payment made outside the country. It may be noted also that Section 10(2) of the Interstate Commerce Act [24] makes it unlawful for a carrier, by false billing or other methods therein set forth, to assist any person to obtain transportation at less than tariff rate.

The obstacles which the Government states would present an effective enforcement of the Act are, therefore, illusory. If any obstacles in fact exist, the scope of the Act cannot be correspondingly enlarged because of their existence. This is a penal statute and should be strictly construed. There is no basis for the loose construction which the Government seeks to place upon it.

C. The offense prescribed in the Elkins Act is primarily the granting of a rebate.

That the offense defined in the statute is primarily the granting of a rebate is illustrated by two decisions of this Court. In *New York Central R. R. Co. v. U. S.*, 212 U. S. 481, the carrier was indicted on six counts for *giving a rebate* under an agreement with the shipper, which provided for payment of the full legal rate, the subsequent presentation of a claim by the shipper and a rebate of a certain sum

[24] *Supra*, note 14.

the carrier to the shipper on account of the claim. Upon viction on all six counts, each of which alleged a separate ment of a rebate, an appeal was taken to this Court on theory that because of the agreement prior to the transtation the offense was single and continuing and a conion for six separate offenses could not be sustained. In olding the conviction on all six counts, this Court said at e 498:

"The statute makes it an offense to give or receive a rebate whereby goods are transported in interstate commerce at less than the published rate; in the present case the jury found the railroad company guilty of rebating as charged. We are not dealing with a case where there was an agreement to carry the goods in the first place at a concession from the established rate, and wherein the railroad company never received the full legal rate. In this case, upon each of the numerous shipments, the full legal rate was paid, and upon claims being presented at short intervals the amount of the stipulated rebate was remitted by check to the shipper. We think the offense was complete when the railroad company thus paid the stipulated rebate to the shipper."

In *New York Central Railroad Company v. U. S.* (No. 12 U. S. 500, the facts were similar to those in the first and a conviction for violation of the Elkins Act was ained where the transportation occurred prior to the age of the Act and the rebates were given after its tment. The Court said at pages 504 and 505:

"It is the contention of the plaintiff in error that the language of this statute addresses itself to the future, and it asks the application of the well-known rule that statutes are presumed to be prospective in their operation, and contends that this act has no reference

to property transported in interstate commerce at
than the published rates at any time before the act
into effect.

. . . . . .

"Manifestly the act does not refer alone to
transportation of the property, although that is an
sential element of the offense, but the thing aimed
the giving or receiving of a rebate whereby the
erty shall be transported at less than the rates
the published tariffs. It is the transaction of giving
receiving the rebate, etc., with the effect that the
of the shipper thus preferred shall be transported
reduction from the published rates, which is penalized

In both of the above cases the prosecutions were
tuted in the Southern District of New York where the
bates were alleged to have been paid, so that there was
consideration by the Court of the jurisdictional provision
the Elkins Act. These cases establish that under the
Act no crime is committed until a rebate is given, and
transportation alone is not an offense unless the
tation is under illegal rates.[25]

A further illustration that the offense charged is
marily the granting of a rebate is found in the fact

[25] In *Standard Oil Co. of Indiana v. United States*,
Fed. 376, certiorari denied, 212 U. S. 579, the Circuit
of Appeals for the Seventh Circuit held that the
offenses under the Act is to be determined by the
of payments, saying at p.385:

"The gist of the offense is the acceptance of the
cession, irrespective of whether the property involved
car loads, train loads, or pounds . . .. Take the rebate
commonest form of the evil—the concession being
variety. In the rebate, the shipper pays in the first
the full rate to the carrier and afterwards receives
part. Manifestly the offense of accepting a rebate
been committed until the shipper has taken back a
the freight money, whereby his property has been
ported at less than the lawful rate."

rosecution was instituted in the present case until almost ve years after the transportation had been concluded. The ransportation occurred in 1932, the alleged rebates were aid on May 15, 1935, and the indictment was not found until larch 6, 1937. If the transportation is such an essential art of the crime as is contended by the Government, it is ifficult to understand why the prosecution is not barred by e three-year statute of limitations.[26]

D. Conclusion.

The only act alleged to have been committed in the astern District of Pennsylvania was the transportation of e various shipments through that district. The Governent concedes that this transportation was lawful at the me that it was conducted. The only instance in which ansportation alone may draw jurisdiction to a district rough which it is conducted is, as was held in the *Armour* se, where it follows the offense of granting a rebate. In ch a case the transportation continues the unlawful act granting a rebate. In the present case, however, the fense of granting a rebate was committed in New York ty almost two and a half years after the transportation as concluded. Manifestly this offense could not be conued by the transportation.

It was stated by Judge Sanborn in the Circuit Court Appeals that the portion of the Act which confers juristion on districts through which transportation may be nducted is unconstitutional and void if the offense is not continuing crime.[27] We contend that this portion of the

[26] Act of April 13, 1876, c. 56, 19 Stat. 32, as amended, S. C., Title 18, § 582.

[27] *Armour Packing Co. v. United States*, 153 Fed. 1, 9. e note 19, *supra*, page 18.

Act is constitutional because it does not purport to confer jurisdiction on the District Court in the present case. In order to sustain the Government's contention, however, the jurisdictional portion of the Act must be construed to have conferred jurisdiction on a court in whose district no crime was committed and hence to contravene the Sixth Amendment.

For the foregoing reasons, appellee urges that:

1. The Elkins Act cannot be construed to confer jurisdiction on the United States District Court for the Eastern District of Pennsylvania; and

2. If the Act is construed to confer jurisdiction, it is unconstitutional under the provisions of the Sixth Amendment.

Appellee therefore requests this Court to affirm the action of the District Court in sustaining the demurrer to the indictment.

Respectfully submitted,

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Of Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 286, 287.—October Term, 1938.

The United States of America, Appellant, vs. Midstate Horticultural Company, Inc., and Arpazat Setrakian.	Appeals from the District Court of the United States for the Eastern District of Pennsylvania.
The United States of America, Appellant, vs. The Pennsylvania Railroad Company.	

[January 30, 1939.]

Mr. Justice Black delivered the opinion of the Court.

These two appeals present for review a single question. As stated by appellant the sole question in each appeal is "whether or not the indictment charges the commission of an offense against the United States in the Eastern District of Pennsylvania, as it must, if appellees are to be prosecuted therein. *Constitution, Article 3, Section 2, Clause 3; Amendment VI.*"[1]

The defendant in No. 287 was indicted in the Eastern District of Pennsylvania charged with making unlawful rebates on interstate shipments. Defendants in No. 286 were charged, by indictment in the same District, with receiving the unlawful rebates. The District Court sustained demurrers to both indictments. The government appealed directly to this Court. Appellees moved here to dis-

[1] Article 3, Section 2, Cause 3 of the Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." Amendment 6 of the Constitution so far as pertinent provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public Trial by an impartial Jury of the State and District wherein the Crime shall have been committed, which District shall have been previously ascertained by Law, . . ."

miss the appeals on identical grounds. The motions to dismiss [illegible] denied in both cases.[2]

The record requires that we treat the indictments to which [illegible] murrers were sustained as charging that rebates or concessions [illegible] paid and received in New York in 1935 in connection with [illegible] transportation of goods in 1932 from California through the Eastern District of Pennsylvania to New Jersey; that the full lawful rate in accordance with published tariffs was paid when the transportation took place; and that prior to the time of the payment and receipt of the alleged rebates in New York in 1935 the carrier and shippers had neither agreed nor intended that any rebate or concession should be made. The government concedes that the jurisdictional provisions of the Elkins Act,[3] on which the prosecutions are based, require trial in the District in which a violation of the Act is committed, but contends that the record discloses violations actually committed in the Eastern District of Pennsylvania. This contention rests upon the argument that the Elkins Act aims primarily to prevent the result of obtaining transportation at less than the lawful rate; that payment and receipt of rebates in 1935 served to accomplish such forbidden results—namely, transportation in 1932 at less than the lawful rate; and, since the transportation in 1932 passed through the Eastern District of Pennsylvania, the offenses were committed and are punishable there.

The statute defines offenses under it as follows: " . . . it shall be unlawful for any person, persons, or corporation to offer, grant or give, or to solicit, accept, or receive any rebate, concession, or [illegible]

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2 The first ground of the motions to dismiss is that appeal was not taken "within thirty days after the decision or judgment" as required by 18 U. S. C. Section 682. The court below wrote an opinion in which it stated "the demurrers are sustained," and filed the opinion June 16, 1938. But in accordance with the court's practice, final order was not entered until July 2, 1938. In that order the court sustained the demurrers and ordered defendants discharged. The government petitioned for appeal July 20, 1938, within eighteen days after the final order was entered, but more than thirty days after the written opinion had been filed. The appeals were from the judgments and orders of July 2, and not the previous written opinion. The second ground of the motions to dismiss is that the government did not have a right of direct appeal to this Court granted by 18 U. S. C., Section 682, which authorizes such an appeal where judgment sustaining a demurrer "is based upon the invalidity or construction of the statute upon which the indictment is founded." The statute under which the indictments were returned provides expressly for the jurisdiction of offenses created by it, and the record clearly discloses that the rulings on demurrers involved a construction of the statute.

3 49 U. S. C., Sec. 41(1), 34 Stat. 587.

rumination in respect to the transportation of any property in interstate . . . commerce by any common carrier . . . whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, ..." As to venue the statute provides: "Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein."

We need not determine whether Congress intended—by providing for the trial of crimes "within the district . . . through which the transportation may have been conducted"—to confer jurisdiction in any District wherein a violation was not committed. The Government only insists that the indictments here disclose offenses committed in the Eastern District of Pennsylvania, and urges that the provision for trial in any District through which illegal transportation is conducted is without meaning unless applicable to these prosecutions.

But there are many offenses in the Act of which this provision is a part to which the provision is clearly applicable. An illustration is that provided in the case of *Armour Packing Co.* v. *United States*, 209 U. S. 56. There an unlawful concession was given in the State of Kansas before interstate shipment was made. Transportation passed through the State of Missouri. The recipient of the concession was tried in Missouri. It was decided that the transaction constituted a continuing offense beginning in Kansas, and that the defendant could be tried in any District through which the unlawful transportation took place. The Court said (at p. 76): "We think the doctrine [of continuing offenses] . . . applies in the present case, for transportation is an essential element of the offense, and, as we have said, transportation equally takes place over any and all of the traveled routes, *and during transportation the crime is being constantly committed.*" (Italics supplied.) The Section of the Elkins Act under which the present indictments were drawn describes other offenses and, in addition, makes it a misdemeanor for a carrier to violate any of the numerous criminal pro-

visions of the Interstate Commerce Act. Congress evidently intended to make it clear that as to any of the many offenses in which "during transportation the crime is being constantly committed" prosecution could be had in any District through which the unlawful transportation moves.

We do not believe Congress intended that subsequent conduct or events should stamp criminality upon an act that was lawful and wholly unrelated to any unlawful plan or purpose, when done. Here, the full lawful rate was paid for the transportation involved. The lawful transportation through the Eastern District of Pennsylvania was not infected by relation to any unlawful agreement, purpose or intent at the time it occurred. The record shows no offense that began in 1932 and continued until 1935. As was clearly set forth by the Circuit Court of Appeals in the *Armour Packing Co.* case:[4] "A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each. . . . The transportation of the goods in this case into and through the Western district of Missouri, at the *illegal through rate*, was the continuing operation and effect in that district of its primary cause, the receipt of the concession and the delivery of the oil by the shipper to the carrier thereunder for transportation in foreign commerce, and even if the shipper's offense was complete in Kansas, it may have been committed in Missouri also, where its operation continued and took effect." (Italics supplied.)

The legal transportation of goods at a lawful rate through the Eastern District of Pennsylvania without intent, purpose, or agreement to commit any part of a crime did not give the District Court of the Eastern District of Pennsylvania jurisdiction to try these defendants under the Elkins Act. On this record no violation of the Elkins Act was begun, continued or brought about[5] in that District. The demurrers were properly sustained and the judgments are

Affirmed.

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[4] 153 Fed. 1, 5, 6. Cf., United States v. Lombardo, 241 U. S. 73, 77.

[5] Cf., United States v. Holte, 236 U. S. 140, 144.

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